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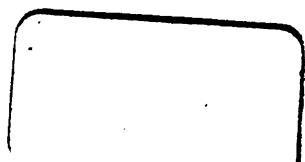
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IN THE

SUPREME COURT

OF

WASHINGTON

SEPTEMBER 3, 1910—DECEMBER 1, 1910

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ERRATA

Page 98, 3d syllabus, line 1, for constitutionality read unconstitutionality

Page 98, 3d syllabus, line 2, for § 6146 read § 6046

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 8742. Department One. September 3, 1910.]

L. C. DEATON, *Respondent*, v. ROBERT ABEAMS *et al.*,
Appellants.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—OBVIOUS DANGERS. An experienced man, capable of and running a woodyard in the absence of the owner, assumes the risks of injury from setting up and operating a saw near a pile of four foot slabs eighteen feet high, which was so dangerously high that any man ought to know that it was likely to fall at any time, according to the testimony of the plaintiff and his witnesses (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 22, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a sawyer employed in a woodyard. Reversed.

W. H. Beatty and *Hastings & Stedman*, for appellants.
Bo Sweeney, for respondent.

CHADWICK, J.—Defendants were the owners of a woodyard located on the shores of Lake Union, where they were engaged in converting the mill wood coming from the Edgewater Lumber Company into stove lengths. In the yard at the time of the injury complained of there were two long ricks of wood, each from sixty to seventy-five feet long. The

¹Reported in 110 Pac. 615.

one being next to a barbed wire fence skirting the railroad right of way was, according to the evidence of plaintiff, eighteen feet high, and in the judgment of his other witnesses, sixteen to eighteen feet high. The other paralleled the first pile at a distance of about two feet, and according to the testimony of at least one witness, these piles in some degree supported each other. The second pile was about half the height of the first pile. The wood had been cut into four-foot lengths at the sawmill and had been hauled by defendants' teams and piled more than a year before the accident, during which time plaintiff had been in the employ of the defendants. During a part of the time and at and before the accident complained of, plaintiff was the sawyer having charge of the saw, and in the absence of Richard Abrams, one of the defendants, seemed to have charge of the yard and the men, although he testified that he gave no orders unless directed by Mr. Abrams. The saw, which was operated by a gasoline engine, was moved from one place to another about the yard.

On the evening before the accident occurred, the crew was engaged in sawing wood in the dry kiln. Having used up the dry wood, plaintiff was directed to move the saw out into the yard and saw off of the lower of the two piles hereinbefore referred to. The saw was moved out into the yard and placed at a point, according to plaintiff's evidence, about twenty feet from the higher pile. Other witnesses fixed the distance at about fifteen feet, and it is more likely that they are correct in their judgment than is plaintiff. The crew began sawing the first thing in the morning, plaintiff being at the platform and propelling the carriage. They had been at work about fifteen or twenty minutes when the high pile fell its full length. Some of the wood struck the first bearer or passer, knocking him down and against plaintiff so that plaintiff fell over the carriage and onto the saw, receiving the injuries of which he complains. Plaintiff began

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an action in the court below, and from a judgment in his favor, defendants have appealed.

Two elements of negligence were set up in the pleadings. The incompetence of a fellow servant, and negligence in piling the wood to an extreme height upon sloping ground. The first ground of negligence was practically abandoned on the trial, leaving only the question, Did respondent assume the risk of his employment?

No defect in piling is shown except in the height of the pile. In passing upon a motion for a nonsuit made during the progress of the trial, the judge who tried the case said:

"Now, the only evidence of negligence with respect to the piling of this slab wood is as to the height of the pile as counsel has stated. I do not believe it will be contended that the evidence shows any negligence with respect to the pile of wood unless the height of the pile constituted negligence in the piling of it. Now, if the appellants were negligent in piling the wood in that way, they would not be liable if the plaintiff appreciates the fact that it was piled too high and the danger incident to the piling of it in that way. Whether he assumed the risk is a question of fact. Reasonable minds may differ about it. It might be that one man from his ignorance or inexperience would not appreciate the danger to be apprehended from a pile of slabs that was piled higher than it ought to be."

The trial judge then left the question to the jury, saying:

"If a man goes to work in a place of open and manifest danger, if he knows the danger attendant upon his employment, or ought to know it in the exercise of reasonable care for his own safety, if he appreciates the risks of danger in his position, or ought to appreciate them in the exercise of ordinary care and observation on his part, he cannot recover even though he may be injured while at work. Where the employer and the employee are on a plane of equal information, then the employer cannot be held liable for accidents that result from the open and manifest danger. If there are dangers connected with an employment which are known to the employer and not to the employee, which he does not observe or would not see in the exercise of ordinary care,

it is the duty of the employer to inform the employee of these unseen dangers—dangers that are not patent and visible.

“So with respect to this defense of assumption of risk, it is for you to inquire from the evidence in this case in the first place whether this rick of slabs was negligently constructed, whether it was built unreasonably high, or unreasonably unsafe, and whether, if so, the plaintiff by reason of his information and experience was aware of the dangers that surrounded him and went to work with knowledge and appreciation of these dangers, or whether he ought to have known about it in the exercise of ordinary care. Notwithstanding the negligence and the danger, if the plaintiff himself knew of it and appreciated it, or ought to have done so, and went to work under those circumstances, under the law he would be held to an assumption of the risk and he could not recover.”

We think there was no question for the jury. Respondent was neither ignorant nor inexperienced. He had worked about woodyards for four or five years, and in this particular woodyard for more than one year. In the absence of Abrams he was capable of running the yard, and did so. He knew all the conditions, not only the physical conditions, but those attending his employment. He knew that the wood was piled dangerously high. He says:

“Q. I will ask you, now, Mr. Deaton, is it not a fact that it is dangerous to pile mill wood eighteen feet high? A. Certainly it is. Q. It is? A. Yes, sir. Q. Any man ought to know that, oughtn't he, that it is dangerous to pile it that high? A. That is pretty high—eighteen feet high is pretty high. Q. Would you say that any man ought to know that was too high to pile wood? A. Yes, sir, it is too high.”

With this his witnesses agree. There are some things which must be charged to the common knowledge of all men. That a pile of wood four feet wide and eighteen feet high is obviously dangerous and that it might fall at any time is apparent to any one in possession of his faculties. As said in *Goddard v. Interstate Telephone Co.*, 56 Wash. 536, 106 Pac. 188: “In this case everything was out in the open.”

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There were no hidden defects, and no knowledge was withheld. In *Soderberg v. Wells*, 57 Wash. 281, 106 Pac. 751, the following rules from the courts of other states were adopted by this court:

"In discussing the safe-place doctrine, in *Borden v. Daisy Roller Mill Co.*, 98 Wis. 407, 74 N. W. 91, 67 Am. St. 816, the court said: 'In the discussion and decision of this case the rule has been kept clearly in mind that a servant is not obliged to search for defects in instrumentalities furnished for his use, but may rely on the duty of the master to see that they are reasonably safe; yet such rule does not militate at all against that other rule, just as well settled in the law of negligence, that the master may rely on the duty of the servant to observe all defects and dangers which reasonable attention to the work in hand will generally disclose to a person of ordinary intelligence and experience in such work.' In *Illinois Cent. R. Co. v. Sanders*, 58 Ill. App. 117, the court said: 'A man cannot decline to see, and then hold the master liable, excusing his own negligence by saying that he was under no primary obligation to investigate.' In *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355, the court said: 'While the employe may repose confidence in the prudent and cautious adherence to duty by the employer, yet, he may not repose that blind confidence in the performance of the employer's duty which fails to observe the patent defects which an ordinary observation of the employe's duty would readily disclose.' In *Chesson v. John L. Roper Lumber Co.*, 118 N. C. 59, 23 S. E. 925, the court said: 'The servant is culpable if he fail to discover such a defect as would have been apparent, without a thorough examination, if he had used ordinary diligence to discover it.'"

These rules are in entire harmony with the former decisions of this court. See, *Shore v. Spokane & Inland Empire R. Co.*, 57 Wash. 212, 106 Pac. 753, where the authorities are collected. To which may be added: *Hoseth v. Preston Mill Co.*, 49 Wash. 682, 96 Pac. 423; *Hogg v. Standard Lumber Co.*, 52 Wash. 8, 100 Pac. 151; *Nordstrom v. Spokane & Inland Empire R. Co.*, 55 Wash. 521, 104 Pac. 809;

Anderson v. Columbia Imp. Co., 41 Wash. 83, 82 Pac. 1037, 2 L. R. A. (N. S.) 840; *Vianello v. Washington Iron Works Co.*, 55 Wash. 552, 104 Pac. 784.

In the latter case the court said:

“While it is the duty of the master to warn his employees of dangers with which they are surrounded, especially when they are ignorant thereof and such ignorance is known to the master, it would be difficult to assume that an employee who had been engaged as the respondent had been for the period of six months, did not have ample opportunity for observing all apparent dangers with which he was surrounded, or that he did not observe the same, and that the master should warn him. . . .”

The consensus of these decisions is, that where the danger is alike open and obvious to the servant as well as the master, both are upon an equality, and the master is not liable for an injury resulting from a danger incident to the employment.

Respondent relies upon the case of *Zintek v. Stimson Mill Co.*, reported in 6 Wash. 178, 32 Pac. 997, 33 Pac. 1055, and in 9 Wash. 395, 37 Pac. 340. These cases are not in point. In neither of them was the defense of assumption of risk set up. In the first report of the case the only question before the court was the question of fellow servant and contributory negligence, where the fact was that the lumber which fell upon and killed Zintek was negligently piled. In the second report it is said that there was no testimony whatever to show that Zintek had any knowledge as to the manner in which the lumber had been piled, or anything to call his attention to the defective condition of the foundation of the pile of lumber.

We have not overlooked the argument made in the brief (although it may be questioned whether the issue is raised by the pleadings) that respondent was directed to work at the particular place the saw was set and that he did not know the danger and that the employer did, and is therefore liable. We think the testimony will hardly bear out this theory. It is true that a general direction was given to go out and saw

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off of the smaller rick, but there is no testimony to show that Abrams directed this, or that it was necessary to put the saw in a place of danger. On the other hand, the saw was set about twenty feet from the high pile to meet the convenience of the crew of which he was the sawyer, showing that the accident resulted through an error of judgment attending a mere detail of the work, and that it would be unjust to charge any of the parties with the anticipation of danger to life or limb, for they had assumed what would appear to be a reasonably safe place to work.

For these reasons the judgment of the lower court is reversed, and the cause remanded with instructions to enter a judgment of dismissal.

RUDKIN, C. J., MORRIS, and GOSE, JJ., concur.

FULLERTON, J. (dissenting)—I think the evidence justified the verdict, I therefore dissent from the judgment ordered.

[No. 8778. Department One. September 3, 1910.]

BURTON HILLIS *et al.*, *Respondents*, v. SPOKANE & INLAND
EMPIRE RAILROAD COMPANY, *Appellant*.¹

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—OBEYING ORDERS OF FOREMAN. A lineman on an electric railway is not guilty of contributory negligence in obeying an order of his foreman to push the tower car across a bridge, upon which they were when a work train was sighted half a mile away, the foreman having first ordered two men back to flag the train, as he had a right to assume that he would be protected.

SAME—RULES—NOTICE OF—DISOBEDIENCE BY FOREMAN. A lineman who had worked but twenty days for the company is not charged with an operating rule addressed to line foremen regarding protection of a tower car on the track by specified signals; and negligence of the foreman in failing to observe the rule cannot be attributed to the lineman.

¹Reported in 110 Pac. 624.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 3, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for the death of a lineman employed upon an electric railway. Affirmed.

Graves, Kizer & Graves, for appellant.

Black & Wernette and *Danson & Williams*, for respondents.

MORRIS, J.—Respondents are heirs of John Hillis, deceased, and brought this action to recover damages for his wrongful death, occasioned by the alleged negligence of appellant. This appeal is taken from a judgment in their favor.

At the time of his death, deceased had been in the employ of appellant about twenty days, and was one of a crew of linemen under the direction of a foreman named Lavell. The crew left Coeur d' Alene on the morning of the injury at 6:20 on one of the appellant's electric trains, and went to a station called Curoe, where they had left the tower car used by them in their work. At this point there was some discussion as to whether they should proceed further at once or wait until a work train which was to leave Coeur d' Alene some twenty minutes after the train which carried the men to Curoe had passed. Lavell, the foreman, consulted a time table, and ordered the men to put the tower car on the track. This was done, and Lavell mounting to the top of the tower, inspected the trolley wire as the men pushed the car along the track. They proceeded in this manner about two miles, when they came to the bridge across the Spokane river. About the center of the bridge, which was some 240 feet long with approaches on both sides, Lavell, on the top of the tower, saw the work train approaching and so informed the men, at the same time sending back two of them to flag and stop the train. Coming down from the tower, he

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ordered the remaining men to push the car across the bridge and take it off. They proceeded to do so, and had gone about 140 feet when one of the men, not having heard any acknowledgment of the flag by the engine, looked back, and seeing the train approaching at such a rate of speed that it could not stop before it reached them, called to the men to protect themselves. All did so except Hillis, who was struck and fatally injured before he could reach a place of safety.

At the time the work train was discovered it was about half a mile away, and approaching a curve on a down grade at about 35 or 40 miles an hour, as estimated by the engineer. The fireman, sitting on the inside of the curve, saw the men on the bridge first and notified the engineer, who supposing that it was some one walking across the bridge and that they would find a place of safety on the stringers of the bridge, made no effort to stop the train, except to lessen the speed to what would be proper in rounding the curve. The conductor, sitting in the cupola of the caboose, in the meantime had seen the tower car, and assuming that the engineer had not, from the fact that the speed of the train was not being diminished, he sent a brakeman to open the angle cock at the end of the caboose. By this time the tower car had been seen by the engineer, who applied the full force of his air, which, acting with the open angle cock, he says caused him to lose control over it, and the wheels became locked and skidded over the rails.

Many assignments of error are made, going mostly to what appellant terms the contributory negligence of Hillis in voluntarily going out upon the bridge, knowing that the work train was following and that no flagman had been sent back to protect the tower car, and in not paying more attention to the approaching train after its discovery by Lavell. There may be circumstances under which it might be held to be contributory negligence for one to attempt to cross a bridge, knowing a train was approaching and no effort was being made by himself or others for his protection,

but it does not seem to us that such a situation is before us. Deceased doubtless knew that, upon the discovery of the work train, two of his companions had gone back to flag it. At that time the train was such a distance away that this could be done with safety, and he had a right to rely upon its being successfully done and the train brought to a stop before it could injure him. In addition, the foreman Lavell, after seeing the train and ordering the flag out, ordered the men to push the car on across the bridge; Hillis had a right to assume that in obeying the order he would be protected from the coming train by Lavell who, knowing the situation, assured them by his order that they could proceed in safety. Even though he had some doubts about the matter, the law would protect him in relying upon the superior knowledge of his foreman and in carrying out the orders given him to proceed. It was plainly Lavell's duty to protect the men when they were pushing the car across the bridge and not permit them to go further than they could in safety. Had he done so the accident might have been avoided, but from the time he came down from the tower and ordered the car across, he seems to have been more intent on the protection of the car than the safety of the men. His failure to perform his duty in this regard was the negligence of the appellant. *Howard v. Delaware & H. Canal Co.*, 40 Fed. 195; *Hannibal & St. Joe R. Co. v. Fox*, 31 Kan. 586, 3 Pac. 320; *Davis v. New York etc. R. Co.*, 159 Mass. 532, 34 N. E. 1070; *Dunphy v. Boston Elevated R. Co.*, 192 Mass. 415, 78 N. E. 479. In fact appellant concedes there was sufficient evidence upon the question of the negligence of Lavell and those in charge of the work train.

The main contention of contributory negligence is based on the violation of a rule of the company in regard to danger signals, the violation of which appellant argues should be charged to deceased. The rule is as follows, under title "Line foreman":

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"When working with the tower car on main track, will see that proper danger signals are displayed on both sides from one-half to one mile from where working, distance to be governed as to grades, curves, etc., but in no case to be less than eighteen pole lengths."

While the violation of this rule would establish the negligence of the foreman and thus create a liability on the part of the company, we can find nothing in the record that brings this rule to the knowledge of Hillis, or from which it would appear that he knew of its existence. He had only been employed about twenty days, and we cannot assume from such a service that he had any knowledge of the rules as to train service. It does not seem from the rule itself that the company anticipated the men to apprise themselves of these rules, since the rule is addressed to the "Line foreman" upon whom the duty of its enforcement rested. We cannot, therefore, agree with appellant that the failure of Lavell to observe this rule is contributory negligence in law chargeable to Hillis. Whether or not it was such in fact was, it seems to us, submitted to the jury and determined in a special verdict by which they found that Hillis did not know that the work train would or might overtake the line crew while working upon the bridge, and that he had no knowledge of its approach until "nearing" the west end of the bridge, which would be about the time when it was noticed by one of his companions, and all leaving the tower car, rushed for safety. From the evidence the jury were justified in finding that, irrespective of the situation in which Hillis might have been placed, either by the facts or the law, the appellant, through Lavell and the train crew, were guilty of gross negligence. *Curtis v. Oregon R. & Nav. Co.*, 36 Wash. 55, 78 Pac. 133.

We have examined the instructions given and refused which are included in the exceptions, and the other assignments of error suggested, and without setting them forth in detail,

we hold no error to have been committed, and the judgment is affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and GOSE, JJ.,
CONCUR.

[No. 8789. Department Two. September 3, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Alexandria Meyer Stitt et al., Appellants*, v. CHARLES REYNOLDS *et al., Respondents*.¹

INFANTS — ABANDONED CHILDREN — CUSTODY — STATUTES—HABEAS CORPUS TO RECOVER—DEFENSES. A preliminary order for the temporary custody of an abandoned child until notice could be given the mother and a hearing had, under Rem. & Bal. Code, § 1701, the statute contemplating an early hearing by giving such cases precedence, is no defense to habeas corpus by the mother to recover possession of her child, where no process was served on her as required by the statute and no further proceedings were had or final order made.

SAME—PRIMA FACIE CASE—HEARING. In such a case, Rem. & Bal. Code, § 1706, making the final order *prima facie* evidence that the abandoned child was properly surrendered to the society has no application; and the court should hear the habeas corpus proceedings on the merits.

Appeal from a judgment of the superior court for King county, Frater, J., entered November 5, 1909, denying an application for a writ of habeas corpus to recover the possession and custody of the relator's minor child. Reversed.

W. F. Hays, for appellants.

Smith & Cole, for respondents.

Crow, J.—Sonia Meyer, a minor child, is the daughter of the relator Alexandria Meyer and A. A. Meyer, formerly her husband, but now deceased. Prior to the death of A. A. Meyer, which occurred in 1905, he by written instrument, ac-

¹Reported in 110 Pac. 633.

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knowledge and delivered, consented to the adoption of Sonia Meyer by the defendants C. A. Reynolds and Della Reynolds, his wife, who then resided in King county. Alexandria Meyer, the mother, did not sign the instrument, but the child, without objection from her, was placed in the custody of Reynolds and wife, where, without formal or legal adoption, she remained until the commencement of this action. After the death of A. A. Meyer, his widow married one W. H. Stitt, and has since been known as Alexandria Meyer Stitt. On April 14, 1908, W. H. Stitt, without notice to C. A. Reynolds or Della Reynolds, was appointed as guardian of Sonia Meyer. Immediately thereafter he as such guardian, and Alexandria Meyer Stitt as the natural mother, demanded the possession and custody of the child, which was refused by Reynolds and wife. Thereupon they made application in this action to the superior court of King county for a writ of habeas corpus, which was issued and served upon the defendants.

Answering the application, Reynolds and wife pleaded their possession, and, in substance, further alleged that in April, 1908, the child by order of the superior court of King county, and upon the petition of the defendant Della Reynolds, had been committed to the custody of the Washington Children's Home Society, a corporation, organized under the laws of this state to receive neglected and abandoned children and place them for adoption, and that thereafter the defendants Reynolds and wife, with the consent of the society, had retained, and were still retaining, the custody of the child subject to the order of the superior court. W. H. Stitt died on April 19, 1909, and on May 17, 1909, Alexandria Meyer Stitt, with leave of court, filed a supplemental complaint in which the Washington Children's Home Society was made a defendant herein. The society, by answer, pleaded the same defense theretofore pleaded by Reynolds and wife. Upon trial the writ was denied and the action dismissed. The plaintiff Alexandria Meyer Stitt has appealed.

All evidence introduced at the trial was stricken, other than records affecting the alleged right of the Washington Children's Home Society to retain the custody of the child. From the evidence of these records and the pleadings, it appears that demand was made for the child by her mother on or about April 15, 1908; that immediately thereafter and on April 17, 1908, Della Reynolds filed her petition in the superior court of King county, in which she alleged that Sonia Meyer was then 7 years of age; that she was without parental control; that prior to his death, her father had surrendered her custody to the petitioner Della Reynolds; that the whereabouts of her next of kin was unknown; and that legal steps should be taken to provide for her care, custody and support. The petition did not mention the mother, nor did it allege that she was of bad character, or that she had abandoned, abused or neglected the child. The petitioner asked that a warrant be issued to take the child; that the usual five days' notice be given to the next of kin; that evidence be taken, and that the court make such final disposition of the child as might be proper. Upon the filing of this petition, an *ex parte* order was immediately entered, reading as follows:

"Upon reading the foregoing petition of Della Reynolds and the court being fully advised, it is hereby ordered as follows: (1) That warrant be forthwith issued by the clerk to the sheriff of King county, authorizing him to take into custody Sonia Meyer, and to keep her in custody at the expense of the county commissioners of King county, pending hearing and disposition of this matter by this court, and to produce her at such hearing, and in the meantime said child be placed in the care and keeping of the Washington Children's Home Society. (2) That the complaint herein be heard before this court on notice to be hereafter given, or as soon thereafter as the matter can be heard. (3) That notice of the time and place of such hearing be personally served upon the mother or the next of kin of said child, if personal service can be had. (4) If personal service cannot be made, then the county commissioners shall cause to be published in a newspaper of general circulation in King county, notice of time, place and nature of said hearing directed to

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the next of kin of Sonia Meyer, at least five days before said hearing."

It further appears that no notice of the filing of the petition has since been given; that no further proceedings have been taken thereon; that the child was surrendered to the society, which immediately placed her with the respondents Reynolds and wife; that on May 29, 1908, the original application for a writ of habeas corpus was made herein, and that after various delays a final judgment was entered on November 5, 1909, in which the trial court found that the child was at the time of the commencement of this action, and ever since has been, in the legal custody and control of the Washington Children's Home Society, and that the writ of habeas corpus should be denied.

It is apparent that the order committing the child to the Washington Children's Home Society is insufficient to support the final order entered herein. The respondents, in substance, contend, that pending the hearing of the petition of Della Reynolds, the child was legally placed in the care of the society; that the court had jurisdiction to make such order pending the application; that the society was entitled to retain the custody of the child until final hearing; and that before an opportunity was given for such hearing, the appellant instituted this habeas corpus proceeding. Section 1701, Rem. & Bal. Code, reads as follows:

"Upon complaint of any person in writing other than an officer or agent of such society or corporation to any judge of the superior court giving the names and residences of the parents, guardian (if any) or the next of kin of such child, so far as known, and alleging that the father of such minor child is dead, or has abandoned his family or is an habitual drunkard or is a man of notoriously bad character, or is imprisoned for crime, or has grossly abused or neglected such child, and that the mother of such child is an habitual drunkard or imprisoned for crime, or an inmate of a house of ill-fame, or a woman of notoriously bad character or is dead, or has abandoned her family, or has grossly abused or neglected such child, and alleging that the welfare of such

child requires that legal steps be taken to provide for its care and custody, a warrant shall issue directing the proper officer to take such child into custody and care for or dispose of it as such judge shall direct, until a hearing can be had, such proceedings shall have precedence of other causes, of which hearing not less than five days' notice shall be given to such parents, guardian or next of kin and such judge shall hear the allegations of the complaint and all testimony offered for or against the same and determine whether in his judgment there is cause for a change in the care and custody of such child. . . . "

Respondents, in effect, contend that the *ex parte* order entered by the superior court, on the filing of the petition of Della Reynolds, constitutes a complete defense to the appellants' application for a writ of habeas corpus. To sustain this contention it would be necessary to hold that such *ex parte* order foreclosed all rights of the mother, and that she cannot in this proceeding question its validity, although she has never been served with process.

In *State ex rel. Le Brook v. Wheeler*, 43 Wash. 183, 86 Pac. 394, in commenting on § 1701, *supra*, we said:

"An examination of this section will show that, before the order contemplated therein can be made, two conditions must exist: (1) that the child has been abandoned by its father, or that he is an improper or unfit person to retain its custody and control, and (2) that the mother of said child is an habitual drunkard, or an improper person to have its custody and control, or has abandoned said child."

The petition filed by Della Reynolds alleged the death of the father, but made no allegation relative to the mother, although she had but recently demanded the child from the petitioner. There is no showing of any attempt to give the five days' notice required by the statute and ordered by the court. Alexandria Meyer Stitt never became party to the proceedings by service of process upon her. It does not appear that she had any knowledge of the pendency of the petition filed by Della Reynolds at any time prior to the making and filing of her application for a writ of habeas corpus.

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After the petition was filed by Della Reynolds, and prior to service of process therein, which should have been promptly made, the superior court had authority to make a preliminary order providing for the temporary custody and care of the child, until such time as service could be obtained and a hearing had. The statute by providing that such proceedings shall have precedence over other causes, contemplates that such hearing shall occur without unnecessary delay. No process having been served, and no date for a final hearing having been fixed, it is apparent that no valid final order disposing of the custody of the child to the Washington Children's Home Society has been made. The society obtained no custody or control which it or the respondents Reynolds and wife can successfully plead as a defense in this habeas corpus proceeding. They cannot rely upon the mere filing of the petition by Della Reynolds and a temporary order entered thereon without notice or process for a dismissal of this later action, which is prosecuted by the mother to obtain the custody of her child. This action should have been heard upon its merits. Evidence should have been taken to determine whether the mother is entitled to the custody of the child, whether she is a fit person to have such custody and control, and whether the best interests of the child will be protected by its surrender to her. Section 1706, Rem. & Bal. Code, reads as follows:

"Upon the hearing of any writ of habeas corpus for the custody of any such child, if it appears that such child has been surrendered to any such corporation under the provisions of this chapter, such surrender shall be taken as *prima facie* evidence that such child was legally and properly surrendered to such corporation and that such corporation is entitled to the custody and control of such child under the provisions of this chapter."

The respondents contend that the *ex parte* order of the superior court heretofore made upon the petition of Della Reynolds, by which the child was surrendered to the society,

is *prima facie* evidence under this section of the fact that the child was legally and properly surrendered to the society, and that the society is now entitled to her custody and control. It is manifest from the entire act that the section quoted refers only to a final order made and entered after notice and hearing, and that it does not refer to an *ex parte* preliminary order such as the one upon which the respondents now predicate their entire defense. The order provided only for the temporary care and protection of the child until the final hearing, which should have been promptly held.

The judgment is reversed, and the cause remanded with instructions to hear the application upon its merits.

RUDKIN, C. J., PARKER, DUNBAR, and MOUNT, JJ., concur.

[No. 8802. Department Two. September 3, 1910.]

J. B. SWEATT, *Respondent*, v. H. W. BONNE *et al.*,
Appellants.¹

CONTRACTS—BUILDING CONTRACTS—ARCHITECT'S FINAL CERTIFICATE—CHANGE IN BUILDING—ACTIONS—CONDITION PRECEDENT. The certificate of an architect to the final completion of a building is not a condition precedent to an action by the contractor for a balance due him, as stipulated in the original contract for its construction, where the parties later agreed to add a basement and a third story, increasing the cost one-half, without any reference to the first contract or without making the architect the arbiter of the final completion of the building as changed; since such stipulations will not be extended beyond the express terms of the contract; and the contractor's request for a final certificate did not make the same essential.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 11, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

¹Reported in 110 Pac. 617.

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Merritt, Oswald & Merritt, for appellants.

Peacock & Ludden, for respondent.

PARKER, J.—This is an action to foreclose a lien claimed by the plaintiff, a contractor, for a balance due him for the construction of a building for the defendants, and for certain extra work upon the building. Findings were made and judgment rendered in favor of the plaintiff. The defendants have appealed.

The facts as found by the learned trial court are, in substance, as follows: On June 24, 1908, the respondent entered into a contract with appellants, whereby it was agreed that he should erect, on a lot belonging to them in Spokane, a brick building for the sum of \$9,987, under the superintendence of L. L. Rand, an architect. By the plans and specifications made part of the contract, it is shown that the building was to be two stories high, and was to rest upon a low foundation, without any cellar or basement. The contract contained certain provisions relating to the authority of the architect and payments to be made upon his certificate, as follows:

“Art. 1. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. . . .

“Art. 3. No alterations shall be made in the work except upon written order of the architect; the amount to be paid by the owner or allowed by the contractor by virtue of such alterations to be stated in said order. . . .

“Art. 4. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be nine thousand nine hundred and eighty-seven (\$9,987) dollars, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owner to the contractor, in current funds, and only upon certificates of the architect, as follows: . . .

"The final payment shall be made within ten (10) days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued."

On July 2, 1908, the respondent entered into a second contract with the appellants, whereby it was agreed that he should build a basement under the building for the sum of \$1,631.69. The terms of this contract were expressed in an order in writing, addressed to the respondent, signed by the architect and, also, by both of the appellants. There were no specifications for this work other than such as were expressed in the order, and there were no drawings, it being understood that the basement should be under the entire building. There were no provisions in this contract touching the authority of the architect, nor any reference to the portions of the first contract upon that subject.

On August 1, 1908, about the time of the completion of the brickwork under the first contract, the respondent entered into a third contract, orally, with the appellants, whereby it was agreed that, in consideration of \$3,750, he should build a third story on the building, to correspond with and be of like kind and finish as the second story described in the first contract. This contract appears as devoid of any reference to the authority of the architect as the second contract.

The respondent, at the request of the architect, sanctioned by the appellants, performed upon the premises in connection with the construction of the building, extra work, furnishing extra material therefor, not included in any of the contracts; which extra work and material were of the reasonable value of \$172.10. The total amount of the contracts and of the extra work and material was \$15,540.79. The appellants paid to the respondent, before the commencement of this action, \$15,168, leaving unpaid \$372.79, claimed by the respondent as the balance due him, which the appellants declined to pay. The respondent complied with all the terms of the contracts, except in so far as they were waived or

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changed by the parties, and has completed the building in accordance therewith, with the exception of placing a layer of cement plastering on top of the walls of the building, which it will cost \$50 to complete. This sum was by the court deducted from the amount claimed, and judgment rendered for the balance. Upon the respondent demanding from the architect a final certificate showing the completion of the building, the architect replied by a letter on January 18, 1909, in which he set forth the particulars in which he regarded the building as not completed, and declined to certify to its completion. One of the specified defects was the want of plastering on the top of the walls. These facts we have summarized from the court's findings, and after a careful reading of the evidence, conclude that they are well supported thereby.

The principal contention of learned counsel for appellants is that, since there was no final certificate of the architect showing the completion of the building, and no proof or finding that such a certificate was arbitrarily or fraudulently withheld, there can be no recovery by the respondent. This contention is rested upon the provisions of the first contract we have quoted above, and the holdings of this court in, *Craig v. Geddis*, 4 Wash. 390, 30 Pac. 396; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790; *Dickerman v. Reeder*, 59 Wash. 405, 109 Pac. 1060. These decisions would seem to support this contention made in behalf of appellants, if this was an action to recover a balance due upon the first contract only, and the building had not been so changed by the other contracts and the extra work as to become a building very materially different in kind and structure from the building originally contracted for. By these changes the cost of the building was increased more than one-half and its size was practically doubled. We think that this is not the building contemplated in the original contract, and the architect was not, by agreement of the parties, made the final judge of its completion. Both of the later contracts, which resulted in the building being so changed as to become a

substantially different building, are silent upon that subject. Whatever the authority of an architect may be as an agreed arbiter between an owner and a contractor, the law will not regard the owner bound by a decision of the architect, except in so far as the owner has unmistakably agreed to be so bound. *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 642; *County of Cook v. Harms*, 108 Ill. 151; *City of Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090; *Chicago & E. I. R. Co. v. Moran*, 187 Ill. 316, 58 N. E. 335; *Fay v. Muhlker*, 20 N. Y. Supp. 671; *Fuller & Co. v. Young & Co.*, 126 Fed. 343.

We are of the opinion that the respondent's right of recovery in this case does not depend upon a certificate from the architect showing the completion of *this building*, since the architect has not been made the judge of that question by agreement of the parties. Nor do we think the mere fact that the respondent asked for a final certificate from the architect showing the completion of the building rendered such a certificate necessary to respondent's recovery, or prevented him from here successfully contending that the architect was not agreed by the parties to be the judge of the completion of the building.

Other contentions involve only questions of fact. We have already indicated our opinion that the evidence fully warranted the findings. The building was substantially completed, and the deduction of \$50 from the amount claimed on account of plastering on top of the walls was a very liberal allowance in view of the evidence.

We find no prejudicial error in the record, and are of the opinion that the judgment should be affirmed. It is so ordered.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

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Syllabus.

[No. 8585. Department One. September 6, 1910.]

**MICHAEL ECKERT *et al.*, Appellants, v. MYRA SCHMITT *et al.*,
Respondents.¹**

PUBLIC LANDS—HOMESTEAD—HUSBAND AND WIFE—COMMUNITY PROPERTY. A homestead upon which final proof was made before the death of the homesteader's wife, is community property, although patent was issued to the husband after the wife's death.

DESCENT AND DISTRIBUTION—HUSBAND AND WIFE—COMMUNITY PROPERTY. Upon the death of a wife, one-half of the community property descends to the children, who become tenants in common with their father.

ESTOPPEL—PLEADING AND JUDGMENT—DIVORCE—EFFECT OF DECREE. Where, in an action for a divorce by a second wife, she alleges and the court finds that the husband owned an undivided one-half interest in a homestead, the other half of which descended as community property to the children of his first wife, and that the husband had caused a mortgage thereon to be foreclosed and had entered into a contract to purchase the equity of redemption in fraud of the children and of plaintiff's rights, a decree of divorce awarding to the wife all of the husband's interests in the property was intended to transfer his half interest only, and estops the wife from claiming the entire title, against the claims of the children.

TENANTS IN COMMON—PURCHASE AT FORECLOSURE SALE—REDEMPTIONS. There is a constructive redemption, which inures to the benefit of cotenants, where a widower, occupying community property as tenant in common with his children, allowed a mortgage to be foreclosed and contracted to purchase the same from the purchaser at the foreclosure sale.

DIVORCE—JUDGMENT—VACATION—LACHES. An action to vacate a decree of divorce upon the ground of perjury of the plaintiff must fail for lack of diligence, where the defendant knew of the perjury at the time of the trial and did not commence the action for nearly four years, claiming that he had but recently discovered the evidence to prove the perjury.

DESCENT AND DISTRIBUTION—MINORS INHERITANCE FROM PARENT. Upon the death of a minor, intestate and without issue, estate inherited from his mother descends to his sisters, under Rem. & Bal. Code, § 1341, subd. 6.

¹Reported in 110 Pac. 635.

TENANCY IN COMMON—ACCOUNTING—PARTITION. Where a divorced second wife has come into the possession of community real property of the first marriage belonging one-half to the children of the first wife, they are entitled to an accounting and partition.

Appeal from a judgment of the superior court for Douglas county, Grimshaw, J., entered July 10, 1909, dismissing on the pleadings an action for equitable relief. Reversed.

Hurn & Curtiss and W. J. Canton, for appellants.

M. B. Malloy and W. A. Reneau, for respondents.

GOSE, J.—This is a suit in equity to establish the rights of the appellants in certain land, for an accounting for rents and profits, and for partition. A judgment of dismissal was entered upon the pleadings, on motion of the respondents. The appellants prosecute this appeal.

The admitted facts are that the appellant Michael Eckert, a married man, filed a homestead entry upon the land, and on April 18, 1892, made final proof of his compliance with the homestead law, and a receiver's receipt was issued to him. On October 26 following, the land was granted to him by the United States, by its letters patent. The wife died intestate on August 3, 1892, about four months after final proof was made and about two months before the patent was issued, leaving as issue of her husband and herself Anna Eckert of the age of eight years, Rosa Eckert of the age of six years, Charles Eckert of the age of three years, and Lena Eckert of the age of one year.

After making final proof, Michael Eckert and his wife mortgaged the land. On the 29th day of October, 1892, Michael Eckert was appointed guardian of his children, and on the 5th day of September, 1893, he was appointed administrator of the estate of his wife. On April 16, 1894, Michael Eckert was married to the respondent Myra Schmitt. On February 2, 1901, the land was sold at sheriff's sale to the mortgagee, upon an order of sale issued upon a decree foreclosing the mortgage, and on February 21, 1902, the land

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was conveyed to the purchaser by a sheriff's deed. On January 4, 1902, Michael Eckert entered into a contract with the purchaser, whereby it agreed to convey the land to him upon his compliance with the terms of the contract. On May 3, 1902, in a suit wherein his then wife, the respondent Myra Schmitt, was the plaintiff and Michael Eckert was the defendant, a decree was entered divorcing them and dividing **certain property between them**. Charles Eckert died unmarried, intestate, and without issue, in March, 1904, he then being of the age of thirteen years. On February 12, 1904, the land was conveyed to respondent Myra Schmitt, then Myra Eckert, by the purchaser at the mortgage sale. She has since married her co-respondent Albert Schmitt. The respondent Myra Schmitt has had the rents and profits of the property since the entry of the divorce decree, and has rendered no account to the appellants. The complaint alleges that the respondent Myra Schmitt, without any consideration, procured the appellant Anna Eckert Buzzard to execute to her a deed to whatever interest the latter had in the land. Issue is joined on this averment. The entire record in the divorce proceeding is made a part of the pleadings.

The appellants contend, (1) that the land was the community property of Michael Eckert and his first wife; (2) that the contract of purchase, which was made before the period of redemption expired, inured to the benefit of the children, who were cotenants of their father; (3) that the decree of divorce and the division of the property was procured through the fraud of the respondent Myra Schmitt; and (4) that the appellants and the respondent Rosa Eckert own the property as an entirety.

We think the first contention must be upheld. Michael Eckert having made final proof of full compliance with the provisions of the homestead law before the death of his wife, the land was community property, and upon the death of the wife, intestate, the minor children became, by operation of law, tenants in common with their father. In *Ahern v.*

Ahern, 81 Wash. 334, 71 Pac. 1023, 96 Am. St. 912, it was held that, where the title is earned but final proof made after the death of one spouse, the property belongs to the community; that a title earned is equivalent in law to a title vested, and that a homestead title is acquired by purchase and not by gift. In the late case of *Krieg v. Lewis*, 56 Wash. 196, 105 Pac. 483, we held that, where the patent issues before the death of the wife, the land is community property.

The respondents contend that, under the rule announced in *Hall v. Hall*, 41 Wash. 186, 83 Pac. 108, 111 Am. St. 1016; *Cunningham v. Krutz*, 41 Wash. 190, 83 Pac. 109, 7 L. R. A. (N. S.) 967; *McCune v. Essig*, 122 Fed. 588; *Id.*, 199 U. S. 382, the land was the separate property of the husband, and that *Ahern v. Ahern* has been overruled. We do not think these cases qualify the principle we have stated. In the *Hall* case, Hall entered the land as a homestead on August 30, 1898, made final proof on August 8, 1899, and received his patent February 9, 1900. Between March 24, 1889, and March 4, 1896, he and Anna M. Hall were husband and wife. On the latter date the wife was granted a divorce. Prior to the decree of divorce, the land was unsurveyed public land of the United States. On the 30th day of August, 1899, John F. Hall remarried, and died in 1903, having before his death conveyed all his interest in the land by deed to his second wife. Upon the facts stated, it was held that the divorced wife had no interest in the property, and that the only interest her husband had in the property at the time of the divorce was the right of occupancy and a preference right to enter the land and acquire title thereto after the same was surveyed and open to settlement.

In the *Cunningham* case the wife died within three years after the homestead entry. Later the husband commuted, made final proof and cash payment, and received a patent. Upon these facts the court said that the husband took the title as his separate property. In *McCune v. Essig* the husband died within a year after making his homestead filing,

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and the wife, upon proof of full compliance with the homestead law, received a patent in her own name. It was ruled by both courts that the widow was a donee in her own right, and that the homestead was her separate property. The supreme court said that, the husband having died before the terms of the statute had been complied with, so as to entitle him to a grant of the land from the government, the statute "which gives him a right, gives her a right. She is as much a beneficiary of the statute as he." "Whilst nothing but the patent passes a perfect and a consummate title" (*Wilcox v. Jackson*, 18 Pet. 498), the revised statutes of the United States, §§ 2291-2, direct that the entryman, upon proof of residence upon the property for a period of five years after the date of the entry, and a compliance with the statute in other respects, "shall be entitled to a patent."

"Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued." *Simmons v. Wagner*, 101 U. S. 260.

See, also, *Barney v. Dolph*, 97 U. S. 652.

We think the principle deducible from these cases is that, after proof has been made of full compliance with the statute, the state law fixes the status of the property. It is true that the legal title does not pass from the government until the issuance of the patent, but, as was said in *Barney v. Dolph*, *supra*, the issuance of the patent is a mere ministerial act. The rule announced in the *Ahern* case may be somewhat modified by the *Hall*, *Cunningham*, and *McCune* cases, but as applied to the facts in the case at bar, it is still controlling.

A proper understanding of the other contentions made by the appellants requires a statement of the record in the divorce case. The respondent Myra Schmitt, in her complaint in the divorce proceeding, alleged that the property was the community property of Michael Eckert and his first wife at the time of her death; "that at the time of the marriage of plaintiff and defendant, the defendant owned an undivided

one-half interest in said land, meaning the land in controversy, subject to said mortgage, and the other undivided one-half interest in and to said real estate belonged to said minor children . . . as heirs at law of their mother, said Mary Ann Eckert, who died intestate"; that with the intent and purpose of defrauding the children and herself out of said land, and contrary to his duty as guardian of his children, and to defeat a redemption, Michael Eckert caused the mortgage to be foreclosed and the land to be sold, and took a secret contract in his own name for the purchase of the land.

Among other facts in the divorce action, the court found "that said defendant has an undivided interest in and to said land, and in and to said land contract, and in and to said personal property, and plaintiff and defendant have a community interest in said land." The court decreed to the plaintiff in the divorce action all the right, title, and interest of the defendant Michael Eckert in the property. Reading the record in the divorce proceeding as an entirety for the purpose of ascertaining the intention of the court, it is obvious that the court only intended to, and did only, give the plaintiff an undivided one-half interest in the property. Moreover, she is estopped to dispute the record which she made. She cannot profit by her own statement of facts in the one case, and then be heard to take an inconsistent position in another case. *Davis v. Wakelee*, 156 U. S. 680; *Potvin v. Denny Hotel Co.*, 37 Wash. 323, 79 Pac. 940; *Womack v. Womack*, 73 Ark. 281, 83 S. W. 937, 1136; *Galt v. Provan*, 131 Iowa 277, 108 N. W. 760; *Territory v. Cooper*, 11 Okl. 699, 69 Pac. 813; *Colpe v. Lindblom*, 56 Wash. 106, 106 Pac. 634. Michael Eckert appeared and defended in the divorce action. The record imports equal verity as to him. The contract of purchase was made within the redemption period, and between him and his cotenants, who were also his wards, it will be treated as a redemption. Indeed, it may be said that Michael Eckert acquiesces in this view.

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The appellants' plea, that the divorce was granted upon perjured testimony induced by the conduct of the respondent Myra Schmitt, does not state a cause for relief. The decree was granted in May, 1902, and this action was commenced in January, 1908. The appellant Michael Eckert admits that he knew that perjury was committed at the time, but asserts that the evidence to establish it was discovered only a short time before the commencement of the action. Assuming, without deciding, that in proper cases a judgment entered upon perjured testimony may be vacated, there is such an obvious want of diligence in the case as to preclude a vacation or modification upon that ground. *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 669, 75 Am. St. 849.

Upon the death of Charles Eckert, a minor, intestate and without issue, the estate which he inherited from his mother descended to his sisters. *In re Fort's Estate*, 14 Wash. 10, 44 Pac. 104; Rem. & Bal. Code, § 1341, subd. 6.

An issue is joined as to the rental value of the property, the validity of the Anna Eckert Buzzard deed, the payment of the purchase price of the land, and the payment of the taxes. Michael Eckert owns no interest in the property. His interest passed to the respondent Myra Schmitt by the decree of divorce. His children inherited and own an undivided one-half interest in the property, less the interest of Anna Eckert Buzzard, if her conveyance is valid. The appellants are entitled to an accounting and partition.

Reversed, and remanded for further proceedings in harmony with this opinion.

RUDKIN, C. J., and FULLERTON, J., concur.

CHADWICK, J. (concurring).—The decision of the majority is correct, but a part of the argument is wrong and I fear may be confusing to the bar. The reference to the case of *Ahern v. Ahern*, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. 912, and the attempt to distinguish its facts from the later cases decided by this court and the case of *McCune v. Essig*,

199 U. S. 382, proceeds upon a misconception of the law. It is true that it was held in the *Ahern* case that, if the spouses had lived more than six years upon a government homestead and the wife died, the property became community property under the rule that a title earned is equivalent to a title vested. The application of this equitable principle to the facts in that case is what made the judgment of this court wrong. As was most clearly pointed out in the *McCune-Essig* case, and the later decisions of this court, the equitable principle applying between men in the ordinary affairs of life, or in the absence of a controlling statute, could have no application, for the obvious reason that the Federal statute fixed the title in the one who made the proof under it without reference to the time of residence. In *Bernier v. Bernier*, 147 U. S. 242, it was said that the object of sections 2291 and 2292, Federal Statutes, was "to provide a method of completing the homestead claim and obtaining patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate." Thus, the argument that an equity would arise in the heirs of a deceased spouse, because the ancestor had lived upon the land for the statutory term and might have made proof, is misleading, and may hold out the hope to some that we are prepared to follow the *Ahern* case under a similar state of facts; whereas, that case has, in my judgment, been overruled by the later decisions of this court. But, whether it has been expressly overruled or not, it could make no difference, for the question is a Federal question, and we would be bound by the Federal statutes and decisions if called upon to meet a like case. Under the Federal statutes the time of residence cannot be made material. Title is vested by the patent in the beneficiary designated by the statute. The same argument that is made by the writer of the majority opinion was met by the supreme court of the United States in the *McCune-Essig* case, the court saying:

"But, it is contended, that a beneficial interest having been created by the state law in McCune when the title

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passed out of the United States by the patent, it 'instantly dropped back in time to the inception or initiation of the equitable right of William McCune, and that the laws of the state intercepted and prevented the widow from having a complete title without first complying with the probate laws of the state.' This, however, is but another way of asserting the law of the state against the law of the United States, and imposing a limitation upon the title of the widow which section 2291 of the Revised Statutes does not impose. It may be that appellant's contention has support in some expressions in the state decisions. If, however, they may be construed as going to the extent contended for, we are unable to accept them as controlling."

The time when the laws of the state can affect the title to property acquired under the Federal laws has been fixed ever since the opinion of the court was announced in *Wilcox v. McConnell*, 13 Pet. 498, 516, wherein it was held:

"We hold the true principle to be this, that whenever the question in any court, state or Federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

In other words, where the title vests according to the Federal statute, the state cannot by any act deprive the donee or patentee of his rights of property, nor can any person assert an equity that would defeat the intent of the Federal law. This case has been frequently followed. See: *Kreig v. Lewis*, 56 Wash. 196, 105 Pac. 483; *De Lacey v. Commercial Trust Co.*, 51 Wash. 542, 99 Pac. 574; *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367.

I concur in the result.

MORRIS, J., concurs with CHADWICK, J.

[No. 8924. Department One. September 7, 1910.]

THE STATE OF WASHINGTON, *on the Relation of James
Wilson et al., Plaintiff*, v. GRAYS HARBOR & PUGET
SOUND RAILWAY COMPANY *et al., Respondents*.¹

EMINENT DOMAIN—PROPERTY SUBJECT—HARBOR AREA—PREFERENCE RIGHT TO LEASE. The preference right of abutters to lease the harbor area lying in front of tide and uplands is property or an interest in land or a "contract right relating thereto, including any leasehold interest therein," which is subject to condemnation for a railroad right of way.

Certiorari to review a judgment of the superior court for Chehalis county, Sheeks, J., entered May 20, 1910, adjudging a public use in condemnation proceedings for a railroad right of way, after a hearing on the merits before the court. Affirmed.

A. Emerson Cross, for relators.

Bridges & Bruener (Bogle & Spooner, of counsel), for respondents.

MORRIS, J.—Certiorari to review a decree of appropriation, whereby respondents were permitted to condemn and appropriate relators' preference right to lease the harbor area lying in front of tide and uplands owned by relators, in and riparian to the Chehalis river at Aberdeen. The case is similar to that of *State ex rel. Hulme v. Grays Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809, and most of the questions now submitted, having so recently been decided in that case, we will not again review them, except to say that we adhere to the rules there announced. The only question submitted by relators not expressly referred to in the *Hulme* case is this contention: that the preference right to lease the harbor area is not property, nor if it be held to be property, is it such property as may be appropriated by

¹Reported in 110 Pac. 676.

respondents for railway purposes. Relators' contention being that such preference right to lease the harbor area is merely an inchoate right, and even though it be fully exercised, the interest in the harbor area thus acquired is neither "any interest in land" nor "contract right relating thereto, including any leasehold interest therein."

In support of these contentions, relators rely upon *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606, and *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845. In the latter case it was held that the act of 1890, giving the improver of tide lands prior to that time a preference right of purchase, does not constitute a contract between the state and the improver giving him any vested right in such lands, but is merely a privilege. The reasoning of this case is that the act itself is not a contract, and there could be no vested right without a contract. In the *Waterway Co.* case, the rule was announced that abutters with only a preference right to purchase tide lands had no such vested right therein as would entitle them to notice respecting any improvement thereof, and the reasoning of the case is that inasmuch as it was conceded that the state was the sole and exclusive owner of the tide lands in controversy at the time of the making of the contracts, its right to make such contract could not be questioned by those having no interest in the lands and who purchased subsequent to the contract and with notice. Prior to purchase, the only right given by the state was a preference right to purchase, which, as against the state, was not a vested interest.

In the case at bar it appears that before the commencement of the proceedings in the court below, the relators had made their application to lease the harbor area lying in front of their tide and uplands, and that the only requisite for such a lease was its formal execution by the state. Such facts being the case, within the reasoning of *State ex rel.*

Billings v. Bridges, 22 Wash. 64, 60 Pac. 60, 79 Am. St. 914, where having the decision in the *Allen* case before it, this court held that where an applicant to purchase tide lands has complied with all the preliminary requirements of the law he has acquired a vested right in such lands.

There is a distinction between the granting of a privilege which may or may not be exercised, and the exercise of that privilege by the person upon whom it has been conferred. In the one case, the state merely confers a right the acceptance of which is optional. In the other, the option has been exercised, and the faith and credit of the state has become involved in its fulfillment. There is nothing in the *Allen* case nor in the *Waterway* case which is authority for any theory that the upland landowner having exercised his right of preference, either of purchase or of lease, fulfilled all the requirements of the law, and awaiting only the state's execution of its part, has not a vested right in such execution and the rights thus to be acquired.

That the right or interest is one capable of being acquired in condemnation proceedings is decided in the *Hulme* case, where the right to acquire the lease of the harbor area as well as the tide lands was involved, and the court referred to it as an additional item of damage in saying, "to which will be added the value of their statutory right to lease the harbor area upon which it abuts." It has never been held that in order to be the object of condemnation proceedings and capable of being appropriated therein, the thing sought shall be real estate or "earth" in some of its various forms in order to come within the statutory requirement of "land" or "interest in land," or "contracts relating thereto" as generally expressed. In *State ex rel. Burrows v. Superior Court*, 48 Wash. 277, 93 Pac. 423, 125 Am. St. 927, 17 L. R. A. (N. S.) 1005, "riparian rights, rights of access, right of light and air, and other kindred and intangible rights appurtenant to real estate," were spoken of as being objects

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of condemnation for public use, citing Lewis on Eminent Domain, page 56.

Finding no error in the decree reviewed, the writ is denied and the decree affirmed.

GOSE and FULLERTON, JJ., concur.

[No. 8543. Department One. September 7, 1910.]

CLARA KIMBLE *et al.*, *Appellants*, v. FRANK STACKPOLE *et al.*,
Respondents.¹

HIGHWAYS—RUNAWAY TEAM—PLEADING—GENERAL DENIAL—ISSUES AND PROOF. In an action for injuries caused by a runaway team, a general denial of an allegation that the team, while under the joint control of the defendants, ran into the plaintiff, admits of evidence upon the part of the defense that the team was running away and beyond the control of the defendants.

PLEADING—DEFENSES—CONTRIBUTORY NEGLIGENCE—INCONSISTENCY. The plea of plaintiff's contributory negligence is not necessarily inconsistent with a general denial of defendant's negligence.

TRIAL—ORDER OF PROOF—REBUTTAL. In an action for injuries caused by a runaway team, evidence in rebuttal to show that the team was not beyond control when it reached a certain point, may be excluded, where the plaintiff's witnesses were examined fully on this subject on their examination in chief.

HIGHWAYS—RUNAWAY TEAM—NEGLIGENCE—SUFFICIENCY. In an action for injuries caused by a runaway team, a verdict for the defendants is properly directed where there was nothing to show what caused the team to run away, or that it was a fractious team, and it appeared that the defendants were not negligent and did all in their power to control it.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered April 28, 1909, upon the verdict of a jury rendered in favor of the defendants by direction of the court, in an action for personal injuries sustained through a collision with a vehicle. Affirmed.

¹Reported in 110 Pac. 677.

Richard Gowan, for appellants.

Thomas Smith and Million, Houser & Shrauger, for respondents.

CHADWICK, J.—On April 14, 1908, plaintiffs were returning from a funeral at Mount Vernon. The way led over a viaduct, or an overhead crossing of the Great Northern railway tracks, which was about three hundred feet long. Their buggy was the first vehicle in front of the hearse, which was driven by defendants. The hearse was followed by several teams. Plaintiffs had entered the viaduct and were about half way over, when the hearse and team driven by defendants came upon the viaduct. The hearse team got beyond the control of the driver and, in passing, collided with the vehicle in which the plaintiffs were riding, and threw Mrs. Kimble to the ground. She suffered painful injuries, and now seeks compensation in damages. After plaintiffs had rested their case, defendants moved for a nonsuit, which was denied. After the whole case was in, defendants moved for a directed verdict, which motion was granted. Judgment of dismissal was entered, and plaintiffs have appealed.

It is the theory of the plaintiffs, that defendants carelessly and negligently drove upon the viaduct at a time when a train was approaching in plain view of the driver; that the team became frightened at the passing train and ran against the plaintiffs' buggy; that it was the duty of the defendants to stop their team at the approach of the viaduct and wait until the train had passed. The gist of the complaint is that the defendants

“did then and there with a team of horses attached to said hearse in the joint possession and under the joint control of the said defendant Frank Stackpole, and the said defendant Frank Esser, by and through his said agent and servant, while driving and operating said team and hearse in a careless and negligent manner, did carelessly and negligently drive said team and hearse, while under their joint control as hereinbefore alleged, against and upon the plaintiff Clara Kimble, whereby the said Clara Kimble was greatly injured.”

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The answer is in the form of a general denial, with an affirmative plea of contributory negligence.

The first error assigned is that the court erred in admitting testimony to the effect that the team drawing the hearse was beyond the control of defendants when it reached and passed over the viaduct, and also when it ran against the buggy in which appellants were riding. This contention is grounded upon the theory that it is nowhere alleged that the team was running away, and that respondents should be bound by the allegations contained in their affirmative answer. We do not understand the rule to be that a lack of control over the team must have been specially pleaded to admit the evidence complained of. Appellants had alleged that the accident occurred at a time when the team was under the control of respondents. A general denial put this allegation in issue, and it was competent to offer any evidence that would challenge or defeat the truth of this assertion. Nor is the plea of contributory negligence inconsistent with the general denial. Where the defense rests upon a denial with plea of confession and avoidance, it is not inconsistent unless the one necessarily and actually contradicts the other. A seeming or logical inconsistency is not enough. *Bowers v. Good*, 52 Wash. 384, 100 Pac. 848; *Irwin v. Holbrook*, 32 Wash. 349, 73 Pac. 360; *Davis v. Seattle Nat. Bank*, 19 Wash. 65, 52 Pac. 526; *Loveland v. Jenkins-Boys Co.*, 49 Wash. 369, 95 Pac. 490; *Corbitt v. Harrington*, 14 Wash. 197, 44 Pac. 132. This is a general rule and is applied where a general denial is followed by the plea of contributory negligence. *Pugh v. Oregon Imp. Co.*, 14 Wash. 331, 44 Pac. 547, 689; *Glass v. Colman*, 14 Wash. 635, 45 Pac. 310.

It is next insisted that the court should have allowed plaintiffs to show on rebuttal that the team was not beyond the control of the defendants at the time it was driven on the viaduct. It would seem from the record that practically every eyewitness, including the defendants, had been sworn and testified in plaintiffs' behalf. This question had been

fully covered by the case in chief. Appellants' witnesses in rebuttal had already testified; one, that the hearse was going at the rate of ten miles an hour; another, eight or ten miles an hour while it was yet two blocks from the viaduct, and another that it was going at a "stiff gait." These witnesses, as well as others, had detailed the occurrence fully, and the court properly refused to recall the witnesses who had testified in chief.

It is also urged that the court erred in directing a verdict. Our attention is invited to the case of *Abby v. Wood*, 43 Wash. 379, 86 Pac. 558. In that case the proximate cause of the injury was the intoxication of the defendant. In this case there is no evidence showing negligence or from which negligence could be reasonably inferred. What caused the team to run away is not made to appear with any degree of certainty. It is not shown that the team was fractious, or that defendants should have used more than ordinary care and prudence under the circumstances attending the accident. The horses were livery horses. One of them had been worked on the hearse three years, and the other five years. At the time they had attained such speed as to indicate that they were beyond the control of the driver, there was no way open but the viaduct. An honest and earnest endeavor was made to pass appellants' buggy, even to driving upon an elevated footway at the side of the wagon road. Both respondents had hold of the lines and tried to stop the team. One of them called out to appellants and warned them so that they might drive to one side. The rule of care in such cases is ordinary care, or such care as prudent men ordinarily use under like circumstances, taking into consideration the time, place, and condition of the highway. A driver will not be charged with negligence unless it appears from the evidence that, by the exercise of ordinary care or watchfulness, he could have seen the danger to which a person on the highway is exposed in time to avoid the injury.

The mere driving of the team on the viaduct while another

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team was on it could not be held to be negligence as a matter of law, it being shown that there was room for one team to pass another. Mr. Kimble, who was just ahead of respondents, saw the train, he fixed it at about a quarter of a mile away, and he "saw that he had time to drive over." Respondents may have judged in the same way. Whether they were negligent in driving over a viaduct when a train was approaching would depend primarily upon the character of the team. There is no evidence tending to show, nor was any effort made to prove, that the team was fractious or liable to become frightened at railroad trains.

A case in point is that of *Cadwell v. Arnheim*, 152 N. Y. 182, 46 N. E. 310, wherein it was said:

"It will not do to submit a question of negligence to a jury, where the facts are equally consistent with the presence or the absence of negligence; or where the jury could do no more than surmise as to the negligence of the defendant. The difficulty with the plaintiff's case was that the facts failed either to disclose any fault in the driver of the defendant's horses, or to warrant a jury in deciding that he could have controlled the action of the frightened animals. . . . On the other hand, there was the testimony of the coachman himself, which was not shaken, or affected as to his credibility, by the evidence of any facts, to the effect that all his efforts to stop, or to direct, the horses, were futile. . . . To submit the case to the jury, under the evidence, was to invite their speculation upon the question; with nothing in the facts to militate against the truth of the coachman's statements."

To the like effect is the case of *Cotton v. Wood*, 8 C. B. Rep. (N. S.) 566, where it is said by Williams, J.:

"There is another rule of the law of evidence, which is of first importance, and is fully established in all the courts, viz., that, where the evidence is equally consistent with either view,—with the existence or nonexistence of negligence,—it is not competent to the judge to leave the matter to the jury. The party who affirms negligence has altogether failed to establish it. That is a rule which ought never to be lost sight of."

The case was one of negligent driving. This principle has been frequently announced by this court. The cases are collected in *Whitehouse v. Bryant Lumber & Shingle Mill Co.*, 50 Wash. 563, 97 Pac. 751. It was there said:

"No legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, and without further showing that it could not reasonably have happened in any other way."

We agree with the trial judge that the cause of the runaway was not shown, that the team was beyond the control of the respondents at and before the time the accident occurred, and that, so far as the evidence shows, the accident cannot be charged to the negligence of the respondents. Mrs. Kimble was the victim of an accident for which the law allows no compensation.

The judgment is affirmed.

RUDKIN, C. J., MORRIS, and GOSE, JJ., concur.

FULLERTON, J. (dissenting).—I am compelled to dissent from the conclusion of the majority as expressed in the foregoing opinion. In the first place I am unable to find any issue in the pleadings on the question whether or not the team driven to the hearse was running away before it reached the viaduct on which the collision occurred. The majority reach the contrary conclusion, it appears to me, by perverting the meaning of the word "control." In the allegation quoted from the complaint, namely, that the defendants "did then and there with a team of horses attached to said hearse in the joint possession and under the joint control of the said defendant Frank Stackpole, and the said defendant Frank Esser, by and through his said agent and servant, while driving and operating said team and hearse in a careless and negligent manner, did carelessly and negligently drive said team and hearse, while under their joint control as hereinbefore alleged, against and upon the plaintiff Clara Kimble, whereby the said Clara Kimble was greatly injured," it ap-

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pears to me manifest that the pleader meant no more than to allege that the team was at the time of the accident under the joint proprietorship of the two defendants; that is, that they stood in the position of owners, responsible for the negligent management of the team. This allegation was necessary in order to show their liability for the accident, and to convert it into an allegation that the driver had the team under due subjection at the time he approached the viaduct is but to play upon words in disregard of their real sense. It was error, therefore, to allow the respondents to show the fact in evidence without a modification of their pleadings.

In the second place, the appellants should have been permitted to contradict the evidence of the respondents to the effect that the team was running away at the time it approached the viaduct. While it is true that some of the plaintiffs' witnesses did testify to the speed at which the team was then traveling, it is true that none of them testified that it had then gotten beyond the control of the driver; indeed, their attention was not directed to that fact, no issue having, up to that time, been made upon it. The question was material because the defendants had sought to justify driving the team on the viaduct in the face of the approaching train by offering evidence tending to show that the team had then gotten so far beyond the control of the driver that they could not be brought to a stop. The plaintiffs, for that reason, had the right to offer contradictory evidence, and the court clearly erred in denying them that right.

If it be true, therefore, that the pleadings were sufficiently broad to admit the evidence objected to, there was plainly a mistrial because of the action of the court in rejecting the evidence offered in rebuttal. This being true, this court ought not to determine the cause on the evidence that appears in the record, but should send it back for a new trial, and determine the question whether or not negligence on the part of the defendants was shown, only after a full hearing

in which all of the admissible evidence offered by the plaintiffs is before the court.

[No. 8839. Department One. September 7, 1910.]

NICHOLAS H. SCHUSTER, *Guardian etc., Appellant*, v.
KNIGHTS AND LADIES OF SECURITY, *Respondent*.¹

INSURANCE—BENEFICIARY CERTIFICATES—ASSESSMENTS—ACCEPTANCE—REINSTATEMENT—ESTOPPEL. A beneficiary society ratifies the acceptance of dues and is estopped from claiming that the member was not reinstated by a payment within the sixty-day period for reinstatement by payment if the member was in good health, where the society had notice at the time that the member was not in good health, but nevertheless retained the payment for over a year after the member's death, and made no tender of repayment until four months after suit was brought on the policy.

SAME—BY-LAWS—WAIVER OF FORFEITURE—VALIDITY. In such a case, a by-law providing that the receipt and retention of dues of a member not in good health shall not reinstate the member is void.

SAME—AGENCY—LOCAL SECRETARY. The local secretary of a beneficiary society, authorized to collect assessments, is the agent of the society.

CHADWICK and MORRIS, JJ., dissent.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 21, 1910, granting a nonsuit in an action upon a beneficiary certificate, after a trial before the court and a jury. Reversed.

Scott & Campbell, for appellant.

Samuel T. Crane and Fred H. Moore, for respondent.

GOSE, J.—The defendant is a foreign corporation, organized and doing business as a fraternal beneficiary society. It has a subordinate lodge in the town of Chattaroy, in this state, known as Royal Council No. 1,380 of The Knights and Ladies of Security. On the 27th day of Octo-

¹Reported in 110 Pac. 680.

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ber, 1906, Minnie A. Schuster became a member of the lodge at Chattaroy, and the defendant issued to her a beneficiary certificate in the sum of \$1,000, payable to her daughter Ethel H. Schuster, upon the death of the assured. The assured thereafter made timely payments of her dues and assessments, up to August 1, 1908. On September 30, 1908, her husband paid her assessments for the months of August, September, and October of that year, to the financial secretary of the local lodge, she then being ill at the hospital in the city of Spokane. Her dues were paid up to January 1, 1909. The assured died on October 2, 1908. Thereafter due proof of death was submitted to the defendant, and payment was demanded and refused. This action was commenced for the recovery of the amount due on the policy on the 21st day of June, 1909. The defendant answered on the 24th day of September following. The assessments were transmitted to the defendant in October, 1908, by the financial secretary of the home lodge, and were retained by it until the last of September, 1909, when the amount was returned to the local secretary at Chattaroy, who tendered it to the plaintiff on October 9 following.

It is conceded that the financial secretary of the local lodge was the proper officer to receive and transmit the assessments. The defendant's by-laws, which under the certificate constitute a part of the contract of insurance, provide that the certificate of each member who has not paid his assessment on or before the last day of the month shall *ipso facto* stand suspended without notice; that no right thereunder shall be restored until it has been duly reinstated; that it may be reinstated within sixty days from date of suspension by payment of all arrearages, provided "that he be in good health at the time of reinstatement; provided further, that the receipt and retention of such assessments or dues in case the suspended member is not in good health shall not have the effect of reinstating said member or of entitling him or his beneficiaries to any rights under his benefit certificate."

They further provide: "The National Council shall not be liable for the illegal receipt of arrears of beneficiary or reserve fund, or National Council general funds or assessments, from suspended members, and the receiving of any such arrears, and receipting therefor by any officer of a subordinate council and the reinstatement of any suspended member except as provided in the laws of the order, shall not be binding on the National Council"; and that a member in default in the payment of his assessments for more than sixty days and less than six months can only be reinstated by the payment of all arrearages, and by presenting a health certificate approved by the company's national medical examiner. The plaintiff offered testimony tending to show that, when the husband paid the assessment on September 30, 1908, he informed the secretary of his wife's illness. This the secretary denies. Upon the facts stated, after both parties had submitted their evidence, a judgment was entered in favor of the defendant for costs. The plaintiff has appealed.

It was alleged in the answer, and it is urged here, that because of the illness of the assured, the payment of the arrearages to the financial secretary within sixty days from the date of the suspension of the certificate did not reinstate it. A reference to the by-laws, to which we have adverted, will disclose that a payment of the assessments to the secretary within sixty days after the suspension of a certificate for the nonpayment of an assessment reinstates the policy, if the member is in good health, and that no method is provided for determining that fact.

The appellant contends that the retention of the assessments by the respondent after having notice of all the material facts operates as a ratification of its acceptance by the local secretary and estops the respondent from asserting the invalidity of the certificate. We think this contention must be sustained. Summarizing the facts, it appears that the tender was made more than a year after the death of the

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insured, about four months after the commencement of the action, and fifteen days after answering. No excuse is offered for the delay. We have seen that the only reason assigned for the nonpayment of the policy is that it was suspended in the lifetime of the assured for the nonpayment of the assessments. Upon the facts stated, when proof of the death of the assured was submitted, it was the duty of the appellant to pay the policy or refund the money which it asserts the secretary accepted without authority. It should then have disaffirmed his acts, and restored, or offered to restore, the money. It sought to do the former, but made no pretense of doing the latter until October 9, 1909. The tender was not timely. We are not unmindful of the language of the by-law quoted, but we are unwilling to stand sponsor for a principle of law which would uphold such a stipulation. The language seemingly has reference to the retention of assessments by local officers. But if it includes the retention by the respondent, the injustice of the provision is too glaring to receive judicial sanction. Cunningly contrived provisions in policies, to the effect that local officers are the agents of the home lodge only, and that solicitors of insurance are the agents of the insured, have been ignored by the courts. The local secretary was the agent of the respondent. *Hoeland v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 Pac. 866; *Modern Woodmen of America v. Teris*, 117 Fed. 369; *Pringle v. Modern Woodmen of America*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231.

To adopt the construction of the by-law contended for by the respondent we would be required to hold that it could have continued to receive the assessments for twenty years, if the assured had lived, and then retained the money and claimed immunity from liability upon her death. That the retention of the money with knowledge of all the material circumstances operates as a waiver of the right to assert that the policy is suspended, is supported by the following authorities: *Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51,

104 Pac. 185; *Rasmusen v. New York Life Ins. Co.*, 91 Wis. 81, 64 N. W. 301; *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915; 29 Cyc. 194, 195, 196; *Masonic Mut. Benefit Ass'n v. Beck*, 77 Ind. 203, 40 Am. Rep. 295; *Life Ins. Clearing Co. v. Altshuler*, 55 Neb. 341, 75 N. W. 862; *Spitz v. Mutual Benefit Life Ass'n*, 5 Misc. 245, 25 N. Y. Supp. 469.

It is conceded that, under the abatement provisions in the certificate, the liability of the respondent is \$850, if there is in fact a liability. We think that, under the admitted facts, the learned trial court should have directed a verdict for the appellant. The judgment will be reversed, with direction to enter a judgment for the appellant for \$850, with legal interest from the date of the death of the assured.

RUDKIN, C. J., and FULLERTON, J., concur.

CHADWICK, J. (dissenting).—I dissent. Mrs. Schuster had been a member of a local lodge of The Knights and Ladies of Security, but had voluntarily allowed her membership to lapse. She became ill, was taken to a hospital in Spokane, where it was made known to her husband that she must submit to a capital operation. Thereupon her husband, the present plaintiff guardian, hastened to the home of the financial secretary of the local lodge and paid the arrearage of dues, as well as some in advance. Even though the local officer had notice or knowledge of the true state of facts, it should not be held to bind the company. The reinstatement was in direct violation of her contract and was a fraud upon the membership. The policy was designed to prevent such frauds. It provides in terms that the receipt and retention of assessments or dues, in case the suspended member is not in good standing, shall not have the effect of reinstating the member or entitling the beneficiary to any rights under the beneficiary certificate. Beneficiary associations are not like insurance companies. Their affairs are not

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conducted for profit. The detail of their affairs are not conducted by trained business agents, but of necessity must go through the hands of lodge members who are frequently unskilled in the ways of business and have no knowledge of the technical rules of the law. The parties had a right to make the contract in the terms stated, and should now be held to it. In my judgment the cases cited in the majority opinion are not in line with the case at bar. Indeed, no case will be found holding that a fraud can be worked against a voluntary fraternal benefit association under the cover of an estoppel. The most the plaintiff is entitled to recover is the amount paid for reinstatement, and judgment should be entered for that amount.

MORRIS, J., concurs with CHADWICK, J.

[No. 8216. Department Two. September 8, 1910.]

M. A. LIVELY *et al.*, *Respondents*, v. J. A. HUSEBYE,
Appellant.¹

CORPORATIONS — ACTIONS — APPEARANCE — COURTS — JURISDICTION. Where a foreign corporation by special appearance tendered a plea to the jurisdiction raising an issue of fact as to whether it was doing business in this state, the appearance was sufficiently general to give the court jurisdiction to determine the issue of fact.

APPEAL—QUESTIONS REVIEWABLE—RIGHT TO ALLEGE ERROR. Error in determining an issue of fact raised by a plea to the jurisdiction over a foreign corporation is reviewable only upon appeal by the corporation.

APPEAL—REVIEW—JUDGMENTS—PRESUMPTIONS — SERVICE OF PROCESS. Upon appeal, and in the absence of any record as to service, personal service of process will be presumed in support of a personal judgment against a foreign corporation, in an action wherein the corporation appeared and tendered a plea to the jurisdiction, where the court found on that issue that the corporation had a branch office and was doing business in the county.

¹Reported in 110 Pac. 673.

CORPORATIONS—STOCK—ACTIONS—COURTS—JURISDICTION—SPECIFIC PERFORMANCE. The courts of this state have jurisdiction of the subject-matter of an action brought by nonresidents to compel a foreign corporation to issue stock to the plaintiffs, where the president and secretary and the individual stockholder improperly in possession of the stock were residents of the state, the company had a branch office and was doing business in the state and where, in case of inability to enforce the decree, a money judgment for the value of the stock could be entered against the defendants.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to compel the issuance and transfer of the capital stock of a corporation. Affirmed.

John O. Bender, for appellant.

Ben F. Tweedy, Elmer E. Halsey, and Chas. L. McDonald, for respondents.

PARKER, J.—The plaintiffs are husband and wife, and seek to recover shares of the capital stock of the Fargo Gold and Copper Mining Company, a corporation, organized under the laws of North Dakota. By their complaint the plaintiffs alleged, in substance, that M. A. Lively (the wife) is the owner of the shares sought to be recovered; that the defendant company has a branch office in Asotin county, this state, is transacting corporation business therein, and that its president and secretary are both residents and citizens of that county; that the company has wrongfully issued the stock sought to be recovered to the defendant Husebye, who wrongfully withholds the same, and that the stock is worth \$278,820. The prayer is for judgment compelling the defendant Husebye to transfer the stock to Mrs. Lively, compelling the corporation to transfer the same upon its books, and in the alternative for judgment against the defendants for the value of the stock. The defendant corporation filed in the case a paper which it denominated a “special appearance.” This paper is in effect a plea to the jurisdiction of

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the court, and tenders an issue of fact touching that question, by allegations as follows:

"The above named defendant, Fargo Gold & Copper Mining Company, appearing specially for the sole purpose of raising the question of jurisdiction of the court alleges:

"(1) That the Fargo Gold & Copper Mining Company is a corporation organized and existing under and by virtue of the laws of the state of North Dakota, and has its place of business in Fargo of said state, and that the plaintiffs and each of them are residents of the state of Idaho, residing at Lewiston of said state.

"(2) That said defendant has not now, and never did have any branch office or other office at Clarkston, in Asotin county, state of Washington, or at any other place in said state; that said defendant is not now transacting, and never did transact any corporation business, or any other business in said county or state at any place, or of any kind, or at any time; that said defendant has no property in the state of Washington, either real or personal, and has no statutory agent, or other agent, as provided by law, or required by law, or at all, on whom legal service of process may be made in said state.

"Wherefore, defendant prays the court for an order dismissing said action as against the defendant, Fargo Gold & Copper Mining Company, for the reason that the court has no jurisdiction of the same."

This plea is verified by the president of the corporation. The portions of the record brought here do not show any other appearance by the company. The defendant Husebye, by his separate answer, denies generally all the material allegations of the complaint, and sets up an affirmative defense containing allegations of a partnership relation existing between him and the plaintiffs, and also allegations of fraudulent acts practiced by them upon him and the corporation in connection with the title claimed by Mrs. Lively in certain mining claims transferred to the company in payment of her stock subscription. A trial resulted in findings and judgment in favor of the plaintiffs, for the transfer by the defendants to Mrs. Lively of 771,400 shares of stock, and that

upon the failure of defendants to make such transfer, Mrs. Lively to recover from them the sum of \$115,710, found by the court to be the value of the stock. From this disposition of the case, the defendant Husebye alone has appealed.

A careful reading of the record, including all of the evidence, convinces us that the facts, so far as necessary for us to notice them, are the following: The defendant company is a North Dakota corporation, and at the time of the commencement of this action had a branch office in Asotin county, in this state, had been for some time transacting corporation business therein, and its president and secretary were then residents and citizens of that county. The plaintiffs are residents of Idaho. In 1901, the plaintiff Mrs. Lively and the defendant Husebye became jointly interested in certain mining claims in Oregon, each owning a one-half interest therein. Negotiations led to an agreement between them to organize a corporation to develop these claims. The corporation was to be organized with a capital stock of \$150,000, divided into 3,000,000 shares of the par value of five cents per share. Mrs. Lively and Husebye were to each have 1,000,000 shares, and to pay for the same by conveying to the corporation these claims; the balance of the stock to be sold to raise money to develop the claims. The company was to be organized under the laws of North Dakota, that being the place of residence of Husebye and others whom it was expected would become interested in the enterprise. This agreement was the result of negotiations carried on in Oregon and North Dakota between Husebye and Mrs. Lively, and also between Husebye and Mr. Lively as her agent.

Thereafter, in August, 1901, in pursuance of this agreement, the defendant corporation was organized under the laws of North Dakota. The defendant Husebye became one of its original directors and its first secretary, and has remained such ever since. Thereafter the corporation ratified the agreement made between Husebye and Mrs. Lively as to each transferring their interest in the mining claims to the

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corporation and receiving 1,000,000 shares of the capital stock, which were to be deemed as paid for by such transfer of claims. Thereafter the claims were accordingly conveyed to the corporation. Husebye and Mrs. Lively having sold portions of their stock, it was issued by the company to the person purchasing it, so that of the stock originally intended to go to Mrs. Lively for her interest in the claims there was left belonging to her 771,400 shares. Thereafter, a short time prior to the commencement of this action, without the knowledge or consent of Mrs. Lively, or of Mr. Lively, her agent, the corporation issued to Husebye all of the remaining stock belonging to both Husebye and Mrs. Lively; Husebye thereby acquiring in his name Mrs. Lively's stock. The stock was worth \$115,710. The learned trial court found against Husebye upon all of the affirmative allegations of his answer, relied upon by him to defeat Mrs. Lively's title to her stock.

No useful purpose would be served by a review of the issues or of the evidence in detail relating to the affirmative defense made by the defendant Husebye. There is practically nothing involved in those issues and the evidence thereon but questions of fact, and we deem it sufficient to say that we are satisfied that the trial court was clearly right in its conclusions upon this branch of the case. It is apparent that the facts established by the evidence, as above briefly summarized, entitled Mrs. Lively to a recovery of her stock as adjudged by the trial court, providing certain other questions involved be determined in favor of the respondents.

The principal contention of learned counsel for appellant is that the judgment against the corporation is void for want of jurisdiction. First, because of want of jurisdiction over the person of the corporation; and second, because of want of jurisdiction over the subject-matter of the action. It is sought to have the judgment reversed and protect Husebye from the effect thereof because of want of jurisdiction to render it against the corporation, upon the theory that

it is a joint and entire judgment against the corporation and the defendant Husebye, and that since it is void as to the corporation, it can have no validity against the defendant Husebye. We state this latter proposition only to show the position of counsel; and since we think an examination of the jurisdictional questions will render it apparent that the judgment is not void as against the corporation, it will not be necessary to notice the contention of counsel that the judgment is such that, if void as to the corporation, it is also void as to Husebye.

Did the trial court acquire jurisdiction over the person of the corporation? Upon this question counsel for appellant has entirely ignored the manner of the service of the summons upon the corporation, and devoted his attention to its appearance in the action, which he insists is only a special appearance, and did not result in the court acquiring jurisdiction over the person of the corporation, as a general appearance would. We have noticed that this so-called special appearance of the corporation was in effect a plea to the jurisdiction of the court, and tendered an issue of fact upon which that jurisdiction rested. Whatever may be said of the technical nature of this appearance, the corporation thereby voluntarily invoked the decision of the court upon a question of fact, the decision of which would determine whether or not the court had jurisdiction. That issue of fact was determined against the corporation, and in such manner as to show that the court had jurisdiction. Whether or not there was error in that determination we will not now inquire, since the corporation has not appealed therefrom. It cannot now say that there was want of jurisdiction to determine the question of jurisdiction, in so far as that question rested upon facts which the corporation's plea voluntarily put in issue. The appearance of the corporation by that plea was at least sufficiently general to give the court jurisdiction to decide that issue of fact. It is true that the portions of the record brought here, and only portions of it have been brought here, do not indi-

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cate that the questions of fact thus raised were determined prior to the trial of the cause upon the merits; do not indicate the manner in which the issues raised by the corporation's plea, or the issues upon the merits, were brought on for hearing; and do not indicate the appearance of the corporation at the trial or otherwise than by the filing of the plea. These things, however, would involve questions of error only, reviewable upon appeal; and the corporation has not appealed. 12 Ency. Plead. & Prac., 119; 1 Black, Judgments (2d ed.), 274; *McClure v. Paducah Iron Co.*, 90 Mo. App. 567; *Ex parte Kellogg*, 6 Vt. 509; *Peters v. Youngs*, 122 Mich. 484, 81 N. W. 263; *In re Wrisley*, 126 Mich. 109, 85 N. W. 456; *Baisley v. Baisley*, 113 Mo. 544, 21 S. W. 29, 35 Am. St. 726.

But let us suppose that the corporation did not appear at all. Even then, we cannot say there was a want of jurisdiction over the person of the corporation. Counsel for appellant have not seen fit to bring here any parts of the record relating to the nature of the service of summons upon the corporation, and since the court has found, which finding we think the evidence fully warrants, that the corporation had a branch office and transacted corporation business in Asotin county, and its president and secretary resided in and were citizens of that county, and the court rendered a personal judgment against the corporation after the corporation had tendered an issue touching the facts upon which jurisdiction depended, we must presume that there was personal service of summons upon the corporation in Asotin county, in the manner provided by § 226 of Rem. & Bal. Code. The most elementary rules touching presumptions in support of judgments of courts of general jurisdiction leads to this conclusion. Bailey, Jurisdiction, § 109; 17 Am. & Eng. Ency. Law (2d ed.), 1075; 11 Cyc. 691. We conclude that the portions of the record before us, and the presumptions arising therefrom, show that the learned trial court had jurisdiction over the person of the corporation, even though the corporation did not appear in the action at all.

Did the court have jurisdiction over the subject-matter of the action? Learned counsel for appellant contends that it did not, because the matter here involved relates to a stock subscription and contract with a foreign corporation, and the internal affairs of a foreign corporation, and that such a controversy is subject exclusively to the laws of the state of the corporation's creation. This contention is substantially the same as that made in the case of *Guilford v. Western Union Telegraph Co.*, 59 Minn. 332, 61 N. W. 324, 50 Am. St. 407, where stock was sought to be recovered by an action in the courts of Minnesota against a New York corporation. Disposing of the contentions made by the corporation, Justice Mitchell, speaking for the court, said:

"If a citizen of this state held a certificate of stock in a foreign corporation, which was alleged to have been illegally issued, or to have for some cause become forfeited, we do not think there would be any doubt but that our courts would entertain a suit by the corporation to compel its surrender and cancellation. If so, why ought not a citizen of the state be allowed to maintain an action to compel the issue to him, as evidence of his title, of a new certificate in place of one that has been lost or destroyed? It is urged that if the courts of this state entertain jurisdiction of such a case they may impose different conditions upon the issue of the certificate from those that might be imposed by the courts of New York or of other states under the same state of facts. This must be conceded. It is one of the necessary imperfections in the administration of justice that courts of different, and even of the same, jurisdictions will differ as to the law applicable to the same state of facts. But it was never heard that this of itself was any reason why a court should not exercise jurisdiction. It is also contended that the courts of this state ought not to entertain the action because they have no means to enforce their decree by compelling the issue of a certificate. It is undoubtedly true that courts will not entertain an action where it is apparent that if a judgment was rendered they would be wholly unable to enforce it. But the mere fact that they may be unable to compel specific performance in a particular way is no reason why the suit

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should not be entertained. If the defendant should refuse to issue certificates in accordance with the judgment, it would be entirely competent for the court, in accordance with the prayer of the complaint, to render judgment for the value of the stock. Our conclusion is that the action can be maintained."

As in that case, the court may be unable to compel specific performance of its judgment in a particular way, for want of jurisdiction over the internal affairs of the corporation; but that is no reason why the action should not be maintained. It is apparent that the judgment has been rendered in accordance with the rights of the parties, and in such form that it will not be ineffectual. It is no different, in effect, from a judgment in replevin or a decree of specific performance where the property involved is beyond the reach of the court at the time of rendering judgment. The court had jurisdiction over the persons of both defendants, and power to render the judgment it did. It is true that the record in this case shows that the respondents are not residents of the state of Washington, but we are not able to see why that fact would result in denying them the right to appeal to our courts by resort to an action purely personal, both as to them and the defendants, when the defendant corporation is found with a branch office, the transaction of business, and its principal officers, to wit, its president and secretary, in the state of Washington, such officers being residents and citizens thereof; and the other defendant also a resident of the state. It may be stated in this connection that the respondents have not been residents of North Dakota since prior to the organization of the corporation in that state. Some other contentions are made by counsel for appellant, but we think they are without merit, and are not such as we feel called upon to discuss them. The judgment of the learned trial court is affirmed.

RUDKIN, C. J., CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 8624. Department Two. September 8, 1910.]

JOHN E. BOYER *et al.*, *Appellants*, v. FRANK W. PAINE *et al.*,
Respondents.¹

MORTGAGES — DEED AS MORTGAGE — SUBSISTING DEBT. Whether an absolute deed was intended as a mortgage to secure a debt, depends generally upon whether there was an existing indebtedness or liability which was still left subsisting and not discharged.

SAME — EVIDENCE — SUFFICIENCY. An obligation to build a canal and furnish water for irrigation, together with a contract for stipulated damages in case of default, to be performed in the future, is secured by an absolute deed, intended as a mortgage, where the same was not discharged by the deed but was left subsisting, and the performance of the contract was prosecuted after the deed was given.

SAME — REDEMPTION — RIGHT TO WAIVE. Since a mortgagor cannot in his mortgage renounce his right of redemption, a stipulation to that effect in a deed intended as a mortgage is of no effect.

EJECTMENT — RELIEF — JUDGMENT — FORECLOSURE OF MORTGAGE — ISSUES AND PROOF. In an action to recover land under a deed to plaintiffs, which the court found to be intended only as a mortgage, in which action the defendant merely asks that it be adjudged to be the owner subject to the mortgage, it is outside of the issues and error to decree a foreclosure of the mortgage; notwithstanding that evidence was received without objection upon the question whether the mortgage had been satisfied.

EJECTMENT — PLEADING — ISSUES AND PROOF. In an action to recover a certain tract of land under a deed intended as a mortgage, it is error to determine the title to another tract upon which a similar mortgage deed was given at the same time, when there was nothing in the issues as to such tract, and the evidence received thereon was material upon the question of intent as to the tract mentioned in the complaint.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered June 29, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action of ejectment. Modified.

¹Reported in 110 Pac. 682.

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Bennett & Sinnott and Dunphy, Evans & Garrecht, for appellants.

T. P. & C. C. Gose and H. S. Blandford, for respondents.

PARKER, J.—This action was commenced to recover possession of real property. The complaint contains only the simple allegations of a complaint in ejectment, in substance, that plaintiffs are owners of lots 1, 2, and 3, of Sec. 13, Tp. 6, R. 33, in Walla Walla county; that they are entitled to the possession of the land, and that the defendants wrongfully withheld the possession thereof. The prayer is for possession of the land and damages for withholding possession. The answer is quite lengthy, and we deem it unnecessary to review its allegations here, further than to state that it alleges, in substance, that the plaintiffs claim title under a certain deed from certain of the defendants executed in behalf of all of them, which deed while absolute in form, was given, together with a deed for other land in Oregon, only as a mortgage to secure the performance of a certain contract, which contract and others claimed to have been executed contemporaneous with the making of the deeds and as part of the same transaction, are set out in the answer, and will be hereafter noticed in our review of the facts developed at the trial. The defendants pray "that the plaintiffs take nothing, that the said instrument of conveyance be adjudged by this court to be a mortgage of indemnity as in this pleading shown, and that the defendant Irrigation Company be adjudged the owner of said lands (subject to said mortgage) and in possession thereof," and in the alternative prays for a reconveyance of the lots in the event the court holds the conveyance thereof was absolute with an agreement to reconvey amounting only to a conditional sale. The reply denies the new matter set forth in the answer, and especially denies that the deed was intended as a mortgage.

A trial before the court without a jury resulted in a judgment denying the prayer of the plaintiffs' complaint, and ad-

judging that the conveyance of the land under which plaintiffs claim title, and also the conveyance of the Oregon land, is in effect a mortgage only, to secure the performance of the contract and payment of damages that may accrue to plaintiffs from a failure to perform the same; that \$1,500 is the amount of damages sustained by plaintiffs on account of defendants failure to perform the conditions of the contract secured by such mortgage; that upon the payment of the \$1,500 damages within thirty days, the plaintiffs reconvey lot 1, and also reconvey the Oregon land subject to a certain mortgage thereon; that in the event of the failure of defendants to pay the \$1,500 damages within thirty days, lot 1 be sold to satisfy the same, thus in effect foreclosing the lien upon lot 1; and that lots 2 and 3 be reconveyed to defendants, this being upon the ground that the lien has been satisfied as to those lots. From this disposition of the case, the plaintiffs have appealed to this court. It is now conceded by appellants that there has been substantial performance of the conditions entitling respondents to reconveyance of lots 2 and 3, and no contention is made against the correctness of the judgment of the trial court directing such reconveyance.

The dealings out of which this controversy grew were between John E. Boyer, acting for all the appellants, and Paine and wife and Burlingame and wife, acting for all the respondents. The interests of the appellants are in common, as are also the interests of the respondents. The land which the appellants seek to recover lies in Walla Walla county, Washington, very near the boundary line between Oregon and Washington. The other lands incidentally involved lie in Umatilla county, Oregon, also very near the boundary line between the two states. The dealings between the parties are somewhat involved and are evidenced for the most part by conveyances and agreements in writing, and in order to be fully advised of the nature and extent of these conveyances and agreements, and their bearing upon

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the intent of the parties in executing the conveyance under which appellants claimed title to lot 1, it will be necessary to quote from them at considerable length. The terms of the first agreement between the parties are expressed in a letter from Boyer to Burlingame, which is in effect an agreement to sell the stock of the Walla Walla Irrigation Company owned by appellants. These terms were assented to by Burlingame, and the letter has since been treated by the parties as the contract for such sale. The letter is as follows:

"Walla Walla, Wash., November 3, 1903.

"Mr. E. C. Burlingame,

"Ellensburg, Wash.

"Dear Sir—Your favor of October 31, 1903, accepting my proposition for the sale of our shares of stock in the W. W. I. Co. and requesting that I send a letter expressing in general terms the nature of the agreement, is at hand.

"As I understand the agreement it is in general terms as follows: That we will sell all of our shares of stock in the W. W. I. Co. to you in consideration of the following:

"1st. A conveyance by you and your wife giving us a clean title, free from all incumbrances, to your farm in Sec. 18-6-35, including full water rights from the W. W. I. Co. for that portion of the farm that lies north of the company's canal, and any other water rights or appropriations for water rights belonging to or appurtenant to said farm now in use or hereafter to be acquired, and everything else appurtenant to the place, with abstract of title brought down to date showing fee simple, absolute, title free from all incumbrances, in yourself.

"2nd. A promissory note for \$1,500 signed by yourself and wife, due one year after date, bearing 7% interest, secured by a mortgage on the southwest quarter of the northwest quarter of Sec. 24-6-34—part of your Oregon farm—and all water rights now appurtenant or belonging thereto or hereafter to be acquired, with abstract of title showing fee simple, absolute, title free from all incumbrances, in yourself.

"3rd. A contract signed by yourself and wife insuring that the W. W. I. Co.'s canal shall be built, and a permanent

supply of water be brought thereby, to our 320 acres in sections 19 and 20 in tp. 6, N. R. 34, with sufficient water unappropriated for other purposes and available for our use to properly and fully irrigate all of said 320 acres, the said canal to be constructed and the water available for delivery to us on said lands as aforesaid on or before January 1, 1906, and with right in us to acquire and have the permanent enjoyment of full water rights that will give us permanent supply of water from said company sufficient for the irrigation of as many acres of said 320 acres as we shall choose to irrigate on our paying to you, or such person as you shall designate, the sum of \$15 for each acre of said land that we shall choose to have irrigated, our right to acquire such water rights to be exercised by us at any time within three years after such permanent supply of water shall be brought to and be deliverable upon said 320 acres, we to have the right to pay for such water right in cash or in promissory notes bearing interest at 6% per annum. To secure the performance of this agreement and understanding on your part you are to furnish us a bond by the security company of which Dice & Jackson, of Walla Walla are agents, in the sum of \$7,500.

"This agreement is to be carried out as far as possible as soon as the papers can be prepared, but you are to have thirty days in which to clear up the title to the property to be conveyed to us and bring the abstract down to date. Our stock to be held by us or in escrow with voting power in us, until the titles to the properties to be conveyed to us, absolutely or by mortgage, are made perfect and all incumbrances removed therefrom. Time to be of the essence of this agreement, and the same to be binding upon, and the benefits and rights thereunder to accrue to, the heirs, representatives, administrators, executors, and assigns of all parties to the agreement.

Yours truly,

"John E. Boyer."

Thereafter, in compliance with the terms expressed in this letter, the following agreement was entered into:

"This Agreement, made and entered into this 5th day of November, 1903, by and between E. C. Burlingame and Elizabeth S. Burlingame, his wife, parties of the first part, and Arthur A. Boyer, Annie I. Norton, John E. Boyer and Sarah I. Boyer, parties of the second part, witnesseth:

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"That said parties of the first part, for and in consideration of the sum of one dollar, to them in hand paid, and other valuable consideration, the receipt whereof is hereby acknowledged, do hereby covenant and agree with, and insure, warrant and guarantee unto the parties of the second part, their heirs, executors, administrators and assigns, that before the first day of January, A. D. 1906, the Walla Walla Irrigation Company will dig, build, construct and complete of sufficient size not less than four feet at the bottom, its main line of canal in the state of Oregon, from the head of said canal in the state of Washington to the west boundary line of section nineteen in township six, north of range thirty-four, east of the Willamette Meridian, as the same is at present surveyed and located as shown on the blue print map of said line of canal prepared by D. H. Guiland, civil engineer; and that said company will before the first day of January, 1906, secure, and convey by means of said canal and laterals therefrom a full and permanent supply and volume of water, unappropriated for other purposes and available for the use of the parties of the second part, in such sufficient amount, not less than one one hundred and sixtieth (1-160) of a cubic foot of water per second of time for each acre to be irrigated, and deliverable at such points by gravity through ditches in the earth, as will enable to be irrigated as they now lie all and every part of the following described lands, situated in Umatilla county, state of Oregon, particularly described as follows, to wit: the south half of the northeast quarter, and the north half of the southeast quarter of section nineteen, and the southwest quarter of section twenty, all in township six, north of range thirty-four, east of Willamette Meridian.

"The said parties of the first part further covenant and agree with and insure, warrant and guarantee unto the parties of the second part, their heirs, executors, administrators and assigns, that they, the parties of the first part, their heirs, executors or administrators, will procure and deliver or cause to be procured and delivered to the parties of the second part, their heirs, executors, administrators or assigns, such sufficient amount of water and deliver the same by gravity through ditches in the earth as such points on said premises as will enable the parties of the second part, their heirs, executors, administrators and assigns, to fully

irrigate according to the rules of good husbandry, such portions of said land as the parties of the second part, their heirs, executors, administrators or assigns, shall desire to have irrigated, and for watering stock raised on the premises and for domestic purposes, said amount of water to be not less than one one hundred and sixtieth (1-160) of one cubic foot per second of time for each acre of land to be irrigated, and will procure and cause to be executed and delivered to the parties of the second part, their heirs, executors, administrators or assigns, one or more good and sufficient contracts, deeds and bonds duly made and executed by some duly organized irrigation company, having sufficient right, title, power, authority, property, responsibility and capacity to insure the performance of its contracts, which contracts, deeds and bonds shall convey, warrant and insure unto the parties of the second part, their heirs, executors, administrators and assigns, a permanent, immediate and perpetual water right or water rights, for, and secure to them the immediate and perpetual use and enjoyment of, such sufficient amount of water, not less than one one hundred and sixtieth (1-160) of one cubic foot per second of time for each acre of land to be irrigated, delivered by gravity through ditches in the earth at such points on said premises as will enable the parties of the second part, their heirs, executors, administrators or assigns, to fully irrigate such portions of said lands as they, the parties of the second part, their heirs, executors, administrators or assigns, shall desire to have irrigated and for watering stock raised on the premises and for domestic purposes; such water and such contracts, deeds and bonds for water to be delivered to the parties of the second part, their heirs, executors, administrators or assigns, in consideration of and forthwith upon the tender, at any time or times within three years after the completion of said main line of canal to the western boundary of said section nineteen, in the manner aforesaid, to the parties of the first part, their heirs, executors, or administrators, by the parties of the second part, their heirs, executors, administrators or assigns, of fifteen dollars for each acre of said lands desired by them to be irrigated, said consideration to be payable in cash or in promissory notes bearing six per cent interest made by the grantees of said water rights. The term 'perpetual water right' used herein shall be con-

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sidered to mean a right to the quantity of water specified to be delivered continually from April 1 to November 1 of each and every year.

"Time is and shall be considered of the essence of this contract, and the same shall be binding upon the heirs, executors and administrators of the parties of the first part."

All things agreed to be done by the Burlingames by the terms of the letter agreement of November 3, 1903, were done by them, save the giving of a surety bond for \$7,500 to secure the building of the canal and furnishing of the water for the 320 acres of land in section 19. Thereafter it became apparent that the Burlingames could not procure the surety bond, and thereupon Boyer demanded real estate security in lieu of such bond. After some delay, the matter was arranged by the making of certain agreements and conveyances, one of the conveyances being for lots 1, 2 and 3, under which appellants claim title to lot 1. These agreements and conveyances are all dated November 15, 1904, and from a careful reading of the evidence we are convinced that all of them were executed as one transaction with a view to render certain the measure of damages which might result from a failure of the Burlingames to perform their agreement of November 5, 1903, relating to the building of the canal and furnishing water for the 320 acres of land, and with a view to furnishing security therefor in lieu of the surety bond agreed to be given. At this time it is plain no damages had accrued by failure of the Burlingames to cause the canal to be built or the water to be furnished, since they had until January 1st, 1906, more than a year later, to perform that part of their contract. There was no occasion then to pay or satisfy any accrued obligation for none had accrued. No purpose was to be served save to fix a measure of such damages as might result to the appellants in the future from a failure to build the canal or furnish the water, and to secure the payment of such possible future damages. This being the situation on November 15th, 1904, we will quote from the agreements and conveyances then made and entered into

between the parties, in so far as we regard their provisions material to the questions before us:

(1) "AGREEMENT FOR LIQUIDATED DAMAGES.

"This Agreement, made and entered into this 15th day of November, 1904, by and between Arthur A. Boyer, Annie I. Norton, John E. Boyer, and Sarah I. Boyer, parties of the first part, and E. C. Burlingame, and Elizabeth S. Burlingame, his wife, parties of the second part,

"Witnesseth: That whereas the parties hereto for the purpose of securing water for, and the perpetual irrigation of, certain lands belonging to said parties of the first part, did heretofore enter into a contract, bearing date the 5th day of November, 1903, wherein and whereby the parties hereto of the second part did, undertake, covenant and agree to perform for the benefit of the parties hereto of the first part, certain things at certain times particularly set forth in said contract.

"And whereas it would be a difficult matter to estimate the damages that would be sustained by the parties of the first part by the failure of the parties hereto of the second part to perform any covenant or agreement by them to be performed contained in said contract; except one certain covenant (hereinafter referred to as 'Covenant for Price of Water') whereby the parties hereto of the second part undertake to fix the price at which they shall deliver to the parties hereto of the first part the water and contracts for water, in said contract agreed to be furnished, to wit: upon the tender to the parties hereto of the second part by the parties hereto of the first part of fifteen dollars (\$15) per acre for each acre of land desired by them to be irrigated—damages for the breach of which 'Covenant for Price of Water' could easily be ascertained, and

"Whereas, it is the desire of the parties hereto that the measure of damages for the breach of each and all of the covenants contained in said contract shall be determined on in advance and not left to the uncertain estimate of a jury,

"Now, Therefore, In consideration of the premises, and for the purpose of fixing the amount of liability of the parties hereto of the second part for damages under said contract of November 5, 1903, and the compensation due the parties hereto of the first part for any breach of the covenants contained in said contract.

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"It Is Hereby Mutually Stipulated, Covenanted and Agreed,

"1st. That, if said parties hereto of the second part shall not be able to perform said 'Covenant for Price of Water,' to wit: if they, the said parties hereto of the second part, shall not be able to deliver said water and contracts for water except upon the payment by said parties hereto of the first part of a larger sum than fifteen dollars (\$15) per acre to be irrigated, but shall perform all the other covenants contained in said contract of November 5th, 1903, then the measure of damages for such breach of covenant shall be the difference between the amount of money required to be paid by the parties hereto of the first part in order to obtain the water and contracts for water aforesaid to be delivered, as specified in said contract of November 5, 1903, and the sum of money required by the terms of said contract of November 5, 1903, to be paid by them to obtain such delivery.

"2nd. That, in case of the failure or refusal of said E. C. Burlingame and Elizabeth S. Burlingame, his wife, to do and perform any act, covenant or agreement—other than said 'Covenant for Price of Water'—by them to be done or performed, specified in said contract made by and between said E. C. Burlingame and Elizabeth S. Burlingame, his wife, as parties of the first part, and said Arthur A. Boyer, Annie I. Norton, John E. Boyer, Sarah I. Boyer, as parties of the second part, and bearing date the 5th day of November, 1903, the parties hereto of the second part shall pay the parties hereto of the first part, as liquidated damages for the failure to perform any such act, covenant or agreement, the sum of one dollar (1) on the first day of each month (succeeding December, 1905,) for each acre of said lands, during the time, and as to which acres, said contract shall remain unperformed by the parties hereto of the second part.

"It is, however, understood and agreed between the parties hereto that the maximum compensation and sum total of all amounts to be paid as liquidated damages by said E. C. Burlingame and Elizabeth S. Burlingame, under the terms of this agreement, to said Arthur A. Boyer, Annie I. Norton, John E. Boyer, and Sarah I. Boyer, shall be and is hereby estimated and fixed at the sum of ten thousand dollars (\$10,000); which sum of ten thousand dollars or proper part thereof, the said E. C. Burlingame and Elizabeth S. Bur-

lingame, shall upon any such failure or refusal, pay to said Arthur A. Boyer, Annie I. Norton, John E. Boyer and Sarah I. Boyer as liquidated damages for the failure or refusal on their part to fully and faithfully perform said contract of November 5th, 1903, or any of its covenants or agreements.

"And in further consideration of the premises the parties hereto of the first part do hereby waive that part of a certain agreement contained in a letter from John E. Boyer to E. C. Burlingame, dated Walla Walla, Wash., November 3, 1903, and said Burlingame's answer thereto, which provided for the furnishing of a bond in the sum of seven thousand five hundred dollars by the security company of which Dice & Jackson, of Walla Walla, are agents."

(2) "DEED TO LOTS 1, 2 AND 3.

"This Agreement, made and entered into this 15th day of November, 1904, by and between Frank W. Paine, and Ida B. Paine, his wife, and John G. Paine, as parties of the first part, and John E. Boyer as party of the second part, witnesseth: .

"That said parties of the first part for and in consideration of the damages sustained by the parties of the second part, on account of the failure by E. C. Burlingame and Elizabeth S. Burlingame, his wife, to faithfully perform a certain contract entered into between them and the said party of the second part, the terms of which are set forth in a letter from said John E. Boyer to said E. C. Burlingame, bearing date the 3rd day of November, 1903, and in consideration of the relinquishment by said party of the second part, of the right to sue for said breach of contract and benefits accruing to each and all of the parties of the first part, by reason of said relinquishment, have granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the said party of the second part and to his heirs and assigns the following described premises, situate, lying and being in the county of Walla Walla, state of Washington, to wit:

"Lots one, two and three of section thirteen in township six, north of range thirty-three (33) east of Willamette Meridian, together with all water rights belonging or appertaining to said lands.

"To have and to hold, the said premises, with their ap-

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purtenances unto the said party of the second part, his heirs and assigns, forever. And the said parties of the first part do hereby covenant that they are the owners in fee simple of said premises, that they are free from all incumbrances, and that they will warrant and defend the same from all lawful claims whatsoever."

(3) "DEED TO OREGON LAND.

"This Agreement, made and entered into this 15th day of November, 1904, by and between E. C. Burlingame and Elizabeth S. Burlingame, his wife, as parties of the first part, and John E. Boyer, as party of the second part, witnesseth:

"That said parties of the first part for and in consideration of the damages sustained by the party of the second part, on account of the failure of the parties of the first part to faithfully perform a certain contract entered into between them and said party of the second part, the terms of which are set forth in a letter from said party of the second part to said E. C. Burlingame, bearing date the 3d day of November, 1903, and in consideration of the relinquishment by said party of the second part of the right to sue for said breach of contract, have granted, bargained, sold and by these presents do grant, bargain, sell and convey to the said party of the second part, and to his heirs and assigns, the following described premises, situate, lying and being in the county of Umatilla, state of Oregon, to wit:

"The north half of the northwest quarter, and the southwest quarter of the northwest quarter of section twenty-four (24) of township six (6) north of range thirty-four (34) east of Willamette Meridian, together with all water rights belonging or appertaining to said lands; subject, however, to a certain mortgage made by said first parties to Arthur A. Boyer, Annie I. Norton, John B. Boyer and Sarah I. Boyer, dated the 5th day of November, 1903, and recorded the 12th day of November, 1903, in volume 26 of Mortgages at page 230, records of said county of Umatilla."

(4) "AGREEMENT TO RECONVEY LOTS 1, 2, AND 3,
AND OREGON LAND.

"This Agreement, made and entered into this 15th day of November, 1904, by and between John E. Boyer, and Louise H. Boyer, his wife, parties of the first part, and Frank W. Paine, John G. Paine and E. C. Burlingame, parties of the second part, witnesseth:

"That the parties of the first part hereby covenant and agree that upon the full and timely performance by E. C. Burlingame and Elizabeth S. Burlingame, his wife, of all the covenants and agreements by them to be performed contained in a certain contract in which said Paines by agreement with said Burlingame are interested, made by and between said E. C. Burlingame and Elizabeth S. Burlingame, his wife, on the one hand, and Arthur A. Boyer, Annie I. Norton, John E. Boyer and Sarah I. Boyer, on the other hand, dated the 5th day of November, 1903, a copy of which contract is hereto annexed, said parties of the first part will make, execute and deliver, or cause to be made, executed and delivered, to said Frank W. Paine, and John G. Paine, or to such person or persons as they in writing shall direct, a deed or deeds, good and sufficient, of all the right, title and interest of said first parties in and to the following described lands and premises, situated in the county of Walla Walla, state of Washington, to wit: Lot one (1) of section thirteen (13) in township six (6) north of range thirty-three (33) east of Willamette. And said parties of the first part will make, execute and deliver, or cause to be made, executed and delivered to said E. C. Burlingame, or to such person or persons as he in writing shall direct, a deed or deeds, good and sufficient, of all the right, title and interest of said first parties in and to the following described lands and premises situated in the county of Umatilla, state of Oregon, to wit: The north half of the northwest quarter, and the southwest quarter of the northwest quarter, of section twenty-four (24) in township six (6) north, of range thirty-four (34) east of Willamette Meridian, together with all water rights belonging or appertaining to said lands; subject, however, to a certain mortgage made by said E. C. Burlingame and Elizabeth S. Burlingame, his wife, to Arthur A. Boyer, Annie I. Norton, John E. Boyer and Sarah I. Boyer, dated the 5th day of November, 1903, and recorded on the 12th day of November, 1903, in Volume 26 of Mortgages at page 230, records of said county of Umatilla, the security of which mortgage is intended to be and shall remain unimpaired so long as the debt thereby secured remains unsatisfied.

"And for valuable consideration, the receipt whereof is hereby acknowledged, the parties of the first part hereby

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lease, demise and let unto the parties of the second part all and singular the above described lands and premises for a term of years commencing with the 15th day of November, 1904, and ending with the first day of January, 1909; provided, however, that if said E. C. Burlingame and Elizabeth S. Burlingame, his wife, shall fail or refuse to perform any covenant or agreement by them to be performed contained in said above mentioned contract, of November 5, 1903, said failure or refusal shall *ipso facto* terminate this lease and all rights of the parties of the second part thereunder.

"It is understood and agreed that time is and shall be considered as of the essence of this contract."

(5) "AGREEMENT AS TO MANNER OF PAYING FOR
WATER.

"For valuable consideration it is hereby mutually agreed that, in case it be elected that any water contracts referred to in a certain contract bearing date November 5, 1903, entered into between E. C. Burlingame and Elizabeth S. Burlingame, his wife, as parties of the first part, and Arthur A. Boyer, Annie I. Norton, John E. Boyer, and Sarah I. Boyer, as parties of the second part, be paid for by said parties of the second part, their heirs, representatives or assigns, by promissory note or notes, said note or notes shall bear interest at the rate of six per cent per annum, interest payable annually, principal on or before five years from the date thereof, in five yearly equal payments commencing one year after the date of said note, and the payment thereof shall be secured by a first mortgage executed by the owner or owners of the land to be irrigated upon the land or lands for, and as to which, such water and contract for water shall be given, according to the provisions of said contract of November 5th, 1903.

"Dated Walla Walla, Washington, this 13th day of January, 1905."

There was an agreement entered into, dated the same day, for the reconveyance of lots 2 and 3 upon making certain improvements by the respondents upon lot 1. This contract need not be quoted at length, since, as we have noticed, it is conceded that respondents are entitled to this reconveyance as adjudged by the court.

We think the evidence clearly warrants the conclusion that

the respondents have at all times remained in possession of lots 1, 2 and 3, and the Oregon land conveyed to Boyer by the Paines and Burlingames; that respondents have paid all taxes assessed thereon since the making of the conveyances; that respondents have raised crops upon the land, without accounting to appellants for the proceeds thereof, and without appellants making any demand for such accounting or any demand for the possession thereof until the commencement of this action; that in the year 1905 the construction of the canal was proceeded with by respondents and was, at least, almost completed before January 1, 1906, as contemplated by the contract of November 5, 1903; there being some conflict in the evidence as to whether or not the contract was substantially complied with in that respect.

With these facts before us, we will first consider the principal question in the case; which is, Was the deed of November 5, 1904, from respondents Paine to appellant Boyer for lots 1, 2 and 3, given to secure the performance of the contract of November 5, 1903, and the damages which might result to appellants from a failure to so perform, and was that deed intended to be in effect only a mortgage, or was it intended as an absolute conveyance without any right of redemption in the respondents except a mere right to repurchase the same? We believe there are certain well recognized principles of law applicable to these facts which will answer this question in respondents' favor. In discussing the question of when a conveyance absolute in form becomes in effect a mortgage, Mr. Pomeroy, in his *Equity Jurisprudence*, vol. 3 (3d. ed.), § 1195, says:

“Whether any particular transaction does thus amount to a mortgage or to a sale with a contract of repurchase must, to a large extent, depend upon its own special circumstances; for the question finally turns, in all cases, upon the real intention of the parties as shown upon the face of the writings, or as disclosed by extrinsic evidence. A general criterion, however, has been established by an overwhelming consensus of authorities, which furnishes a sufficient test in

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the great majority of cases; and whenever the application of this test still leaves a doubt, the American courts, from obvious motives of policy, have generally leaned in favor of the mortgage. This criterion is the continued existence of a debt or liability between the parties, so that the conveyance is in reality intended as a security for the debt or indemnity against the liability. If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still left subsisting, not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing and bound to pay it at some future time, so that the payment stipulated for in the agreement to reconvey is in reality the payment of this existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instruments."

In 27 Cyc. 1010, the same doctrine is stated in the text as follows:

"A definitive test to determine whether an absolute deed, executed in consideration of a precedent debt, with an attendant agreement to reconvey the premises to the grantor on payment of the consideration, constitutes a mortgage or a conditional sale is found in the question whether the debt was discharged by the deed or subsisted afterward. . . . If the conveyance leaves the debt still due and owing, the grantor being bound to pay it at some future time, and being entitled to receive back his property when he does pay it, then the whole transaction amounts to a mortgage, whatever form the parties may have given to it."

See, also, 1 Jones, Mortgages (6th ed.), §§ 264, 265.

In support of appellants' contentions that this deed must be regarded as an absolute conveyance, the following cases decided by this court are called to our attention and relied upon by learned counsel for appellants: *Dignan v. Moore*, 8 Wash. 312, 36 Pac. 146; *Swarm v. Boggs*, 12 Wash. 246, 40 Pac. 941; *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61; *Conner v. Clapp*, 37 Wash. 299, 79 Pac. 929. We think, however, a critical reading of these cases will show that none

of them involve agreements where a debt or other obligation subsisted against the grantor after the making of the conveyances there claimed to have been given as security. The remarks of the court in *Reed v. Parker*, on page 116, recognizes the rule of the foregoing quotations from Pomeroy and Cyc. These cases are therefore not controlling in this case, if the obligation to build the canal and furnish water, and to respond in damages for any failure in that regard, continued to exist after the making of the deed relied upon by appellants in support of their title to lot 1. It seems to us that the contract of November 5, 1903, to build the canal and furnish water by the first day of January, 1906, together with the contract of November 15, 1904, agreeing to the measure of damages which might result to respondent by a failure to complete the canal and furnish water, clearly evidence an obligation to continue in existence after the making of the deed, and that the deed was given to secure the fulfillment of such obligation.

We are also of the opinion that such an obligation to be performed in the future has the same effect upon the question of the conveyance being a mortgage to secure the same as if it was an obligation to pay a debt in the form of a fixed sum due at a certain time in the future. The very fact that the parties entered into the agreement fixing the measure of damages which might arise in the future shows that they did not regard the obligation to complete the canal and furnish water, and the obligation to pay damages in case of failure so to do, as satisfied by the giving of the deed. If it had then been the intentions of the parties to regard the giving of the deed as a full satisfaction of respondents' obligations under the contract of November 5, 1903, there would have been no occasion to enter into the agreement of November 15, 1904, in connection with the giving of the deed, as to the measure of possible future damages. Indeed, at that time there were no accrued damages to satisfy. There had been no failure to perform the contract to

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build the canal and furnish water, for there was then more than a year left in which to perform that contract. The only condition then unperformed was the failure to furnish the surety bond, and of course, no damage could accrue by reason of that failure unless there also be a failure to build the canal and furnish water, which we have seen could not occur until more than a year after that time.

As a further evidence of the fact that the parties had in mind an obligation to be performed by the respondents in the future, we have the fact that the canal was not then constructed, and that respondents performed at least nearly the whole of the construction work upon the canal after the giving of the deeds, and on January 13, 1905, after the giving of the deeds and the making of the other contemporaneous agreements, the agreement was entered into as to the manner of paying for the water which was to be delivered in the future by this canal. Clearly, respondents' obligation to perform the contract and to pay damages upon a failure so to do did not cease to exist upon the giving of the deed.

It is true that the deed upon its face purports to be given in consideration of damages sustained on account of failure to perform the conditions of the contract of November 3, 1903; but we have seen that the only failure in the performance of that contract was the failure to furnish the surety bond, and that no damages could occur by reason thereof except such as might flow from the failure to do the things which the surety bond was intended to secure; to wit, the building of the canal and the furnishing of water; and there could be no damages on that account until the time for the performance of that agreement had expired, which would be January 1, 1906, more than a year after the giving of the deeds. The most that can be said of this and other language in the deed evidencing an intent to make it an absolute conveyance, is that such language indicates a possible attempt to waive respondents' right of redemption; and it is elementary that this cannot be done if the deed was in fact

given as a mortgage. In 1 Jones on Mortgages (6th ed.), § 251, it is said:

"The mortgagor is not allowed to renounce beforehand his privilege of redemption. Generally, every one may renounce any privilege or surrender any right he has; but an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions in order to raise money. When one borrows money upon the security of his property, he is not allowed by any form of words to preclude himself from redeeming. A stipulation, that unless the debt is paid within a certain time the deed shall be absolute, will not be given that effect, because the very terms of the agreement show that the instrument is a mortgage, and such agreement of the parties in the mortgage itself or otherwise, made at the time, is without effect. He cannot agree that upon default his mortgage shall become an absolute conveyance."

See, also, 27 Cyc. 994, 1098. We are of the opinion that this deed is in effect a mortgage.

Let us now consider that part of the judgment which in effect forecloses the mortgage upon lot 1, existing by virtue of the deed and agreements of November 15, 1904. It is contended by counsel for appellant that, even if this deed be held to be a mortgage, there is no warrant for a judgment foreclosing the same in this action, and to that extent the judgment is in any event erroneous, because it is an attempt to determine issues not involved in the case. We think this contention must be upheld. There is nothing in the appellants' complaint or reply that could be construed as putting in issue the matter of the foreclosure. The facts there alleged only go to the question of appellants' title to the land under the deed. Indeed, the sole contention of appellants, as evidenced by their complaint and reply, is that the deed conveyed an absolute title and was not given as a mortgage. The answer of respondents alleges only facts tending to show that the deed is in effect a mortgage, and prays "that the defendant irrigation company be adjudged the owner of said lands, subject to said mortgage," and then, after an al-

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ternative prayer for a reconveyance in the event the court should hold the contract to reconvey to be a conditional sale, the prayer concludes, "that the court do full and complete equity in this case."

It seems clear to us that a foreclosure, or the possibility thereof, in this action could not have been in the minds of the appellants when they were offering their proof in this case. They were contending that there was no such mortgage, while respondents were contending to the contrary and seeking to have the irrigation company adjudged the owner of the land "subject to said mortgage." Neither party was seeking to have the amount of damages which the mortgage was given to secure adjudicated. The existence of the mortgage was in issue but not its foreclosure. The evidence covered rather a wide range upon the question of the completion of the canal, and incidentally as to whether or not it was so far completed that only nominal damages had resulted to appellants. Much of this evidence was given without objections, and learned counsel for respondents contend that the issues were thus voluntarily broadened so as to enable the court to render that part of its judgment which, in effect, foreclosed the mortgage, in view of the general concluding prayer in the answer. We cannot agree with this contention. This evidence was material upon the question of whether or not the mortgage had been satisfied, and its admission probably broadened the issues so as to include that question, and probably the court could have adjudged the mortgage satisfied had this evidence been sufficient to show that fact; but it seems to us, the very fact that the court found the damages secured by the mortgage then amounted to \$1,500, shows that such damage was more than nominal, and therefore that the mortgage was not satisfied. We are of the opinion that the receiving of evidence touching this question in no event broadened the issues beyond the question of the satisfaction of the mortgage, and fell far short of

putting in issue its foreclosure. In rendering this part of the judgment, we think the learned trial court was in error.

We have noticed that the judgment assumes to adjudicate the rights of the parties to the Oregon land, which was conveyed by the Burlingames to Boyer at the same time as the conveyance of lot 1 by the Paines to Boyer. This is claimed to be erroneous, because the title to that land was not put in issue by the pleadings in this cause, and because the court could in no event have jurisdiction to determine title to that land. It is plain that there is nothing in the pleadings in this case indicating any intention by any of the parties to put in issue here the title to that land. The fact that it appears incidentally by the proof in this case that the deed to that land was given with the deed to lot 1 for the purpose of securing the performance of the contract of November 15, 1904, to construct the canal and furnish the water, and was therefore in effect a mortgage, does not authorize the rendering of a judgment in this case to that effect. It may be that the facts in this case show respondent is entitled to such a judgment, but that was not a question before the court for adjudication in this case. The evidence tending to show that the deed to the Oregon land was given as a mortgage was material to the question of the intent of the parties in the execution of the deed to lot 1 which is here involved, but that did not bring into this case for adjudication the title to the Oregon land. We think this portion of the judgment is erroneous.

We conclude that in so far as the judgment denies to appellants the recovery of lot 1 and adjudges the deed of November 15, 1904, given by respondents Paine, to appellant John E. Boyer for lots 1, 2 and 3, to be in effect a mortgage to secure the performance of the contract for the construction of the canal, the furnishing of water, and the payment of damages that might accrue to appellants from a failure of such performance, and directs the reconveyance of lots 2 and 3, the judgment should be affirmed, and that as to

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Citations of Counsel.

all other matters therein sought to be adjudicated the judgment should be reversed. It is so ordered.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8533. Department Two. September 10, 1910.]

GEORGE OLSON, *Appellant*, v. ALMA G. SPRINGER *et al.*,
Respondents.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—CONVEYANCES—MORTGAGES. In the absence of fraud or deceit, a mortgage upon community property executed by the wife alone is void.

SAME—MORTGAGES—ESTOPPEL. A husband, to whom a loan of \$700 was made, secured by a note and mortgage upon community property executed by the wife alone, is not estopped to question the validity of the mortgage lien by the fact that he consented to the execution and delivered the mortgage, and that the community would be liable for money had and received.

ESTOPPEL—PLEADING. An estoppel must be pleaded.

Appeal from a judgment of the superior court for Kitsap county, Yaakey, J., entered September 8, 1909, dismissing an action to foreclose a mortgage, after a trial on the merits before the court without a jury. Affirmed.

George Olson (Edward Judd, of counsel), *pro se*, contended that the mortgage was not void, but only voidable, and that the husband was estopped to question its validity. *Holyoke v. Jackson*, 3 Wash. Ter. 235, 3 Pac. 841; *Hoover v. Chambers*, 3 Wash. Ter. 26, 13 Pac. 547; *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976; *Sadler v. Niesz*, 5 Wash. 194, 31 Pac. 630, 1080; *Konnerup v. Frandsen*, 8 Wash. 551, 36 Pac. 493; *Boston Clothing Co. v. Solberg*, 28 Wash. 262, 68 Pac. 715; *Washington State Bank of Ellensburg v. Dickson*, 35 Wash. 641, 77 Pac. 1067.

J. C. Cross (A. Emerson Cross, of counsel), for respondents.

¹Reported in 110 Pac. 807.

CROW, J.—This is an action to foreclose a mortgage on real estate. The plaintiff, George Olson, alleged that on September 11, 1908, the defendant Alma G. Springer executed and delivered to one J. B. Thagard her note for \$700; that, to secure its payment, she also executed and delivered to Thagard her mortgage deed on forty acres of land in Kit-sap county; that the mortgage and note were afterwards assigned to plaintiff; that Alma G. Springer is the wife of defendant N. A. Springer; and that the note has matured at plaintiff's election, by reason of nonpayment of interest. The defendants, Alma G. Springer and N. A. Springer, by separate answers, admitted the execution of the note and mortgage by the wife, but affirmatively alleged that the land in the mortgage described is the community property of the defendants; that Alma G. Springer had no authority, by power of attorney or otherwise, from N. A. Springer to execute the alleged mortgage; that the mortgage is void, and that it creates no valid lien upon the land. This affirmative defense was not denied by reply. The trial court held the mortgage void and dismissed the action. The plaintiff has appealed.

The appellant contends that the mortgage is voidable only; that N. A. Springer, the husband, is estopped by his own acts from questioning its validity; and that, being given for unpaid purchase money, it takes precedence over any community interest in the land acquired by respondents. The evidence shows that the respondent N. A. Springer was engaged in the business of boat building, by which he earned a livelihood for himself and family; that he built a certain launch which he sold to appellant, who agreed, as a consideration therefor, to deed him the forty acres of land and assume certain obligations against the launch; that after the conclusion of this deal and before the final delivery of the deed, N. A. Springer needed money, a loan of which the appellant procured for him from Thagard, who is appellant's brother-in-law; that the total amount loaned was \$700; that at Springer's request the land was conveyed to his wife, Alma G.

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Springer; that at the time of the execution and delivery of the deed, the appellant himself prepared the note and mortgage running to Thagard, to be executed by Mrs. Springer; that he delivered them to Mr. Springer who carried them to his wife, and returned them to appellant after they had been executed by her alone.

There is no contention that any fraud or deceit was perpetrated by Springer or his wife; that appellant was ignorant of the fact that Springer was a married man, or that appellant did not know the land was community property. It is apparent from the evidence that the launch was the sole consideration for the purchase of the land, and that the mortgage, although executed when the deed was delivered, was a separate transaction. There can be no question but that the land became, and was, the community property of respondents. Community real estate cannot be conveyed or encumbered, unless the husband and wife join in executing the deed or other instrument by which it is to be conveyed or encumbered. All conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance thereon, must be by deed, and a deed must be in writing, signed and acknowledged. Rem. & Bal. Code, §§ 5918, 8745, and 8746.

In *Humphries v. Sorenson*, 33 Wash. 563, 74 Pac. 690, appellant sought affirmative relief based upon the foreclosure of a mortgage on community property which had been executed by the wife alone, and this court said:

"The appellants pray in their amended answer, on which they take the burden of proof, under their affirmative defense, that the title in fee simple in this land be quieted in appellant Rasmus Sorenson. They allege that, at the times when the mortgage to Grinstead and the deed to Lee were executed by Catherine Loree, she was the owner in fee of this real estate; and appellants attempt to establish title in themselves by virtue of the proceedings alleged in such answer as to the foreclosure of that mortgage, and sale and sheriff's deed thereunder to appellant Rasmus Sorenson. We are of the opinion,

that the record fails to sustain the issues tendered by appellants under such defense; that, under the testimony adduced at the hearing in the superior court, this real estate was, at the times above noted, the community property of Moses and Catherine Loree, and not the separate property of the wife (Catherine Loree); that the trial court committed no error in so finding, and in adjudging such instruments and proceedings invalid; and therefore we cannot grant appellants the affirmative relief for which they pray."

The appellant does not contend that the mortgage was executed in the manner required by law, but does contend that the respondent N. A. Springer should be, and that he is, estopped from questioning its validity, because he personally carried it to his wife for execution and afterwards delivered it to appellant for Thagard, thereby consenting to its execution by the wife alone, for and on behalf of the community. It is elementary that facts relied upon as an estoppel must be pleaded. The appellant has not pleaded estoppel, nor does the evidence show facts sufficient to sustain any claim of estoppel. Neither Springer nor his wife made any false statement as to the title to the property, nor did they make any misrepresentations upon which appellant relied. He prepared the note and mortgage without suggestion from them, doing so with knowledge of all the facts, and delivered them to Springer for execution by the wife alone. Appellant is presumed to have known the law, and to have also known that a mortgage on community property executed by one spouse only would create no lien. He may have a valid claim against the respondents for money loaned to the community, but he certainly holds no lien upon the real estate under the mortgage pleaded.

There is no merit in appellant's further contention that the note and mortgage were given to secure unpaid purchase money. The launch paid for the land, and the money for which the note was given was borrowed from Thagard, a third party. The judgment is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, and PARKER, JJ., concur.

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Statement of Case.

[No. 8602. Department Two. September 10, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Fred N.**Hallett et al., Appellant, v. SEATTLE LIGHTING**COMPANY, Respondent.*¹

APPEAL—DISMISSAL—CESSATION OF CONTROVERSY—MANDAMUS. In mandamus for the installation of separate gas meters in an apartment house, the installation of one general meter pending an appeal does not work a cessation of the controversy.

MANDAMUS—ANSWER—FORM—SUFFICIENCY. An affidavit is sufficient as an answer in mandamus, where the allegations of the complaint and alternative writ were put in issue thereby and the same was in effect an answer, and after demurrer thereto there was a trial on the merits.

GAS—CORPORATIONS—RULES. It is a reasonable regulation of a gas company to require that its customers owning apartment houses and desiring to install more than one meter shall provide a separate meter room on each floor or in the basement where all meters may be installed, where it appears that such an arrangement would be more sanitary, and there would be less danger of explosion in case of fire and less trouble and expense in making repairs and collections.

GAS—CORPORATIONS—RULES—WAIVER. The waiver by a gas company of its regulations as to buildings that had already been constructed, does not estop the company from enforcing the regulations as to new buildings constructed with notice of the rules.

COSTS—ON APPEAL—MANDAMUS—RELIEF—DISMISSAL. On appeal from a judgment denying a writ of mandamus to compel a gas company to install separate meters, the appellant cannot, in order to avoid costs, have a writ to compel the installation of one general meter, where that service was tendered the appellant and rejected at the trial below.

Appeal from a judgment of the superior court for King county, Main, J., entered May 14, 1909, dismissing an action for a writ of mandamus, after a trial on the merits before the court without a jury. Affirmed.

¹Reported in 110 Pac. 799.

Keenan & Hardinger, for relators.

H. R. Clise and *C. K. Poe*, for respondent.

Crow, J.—Fred Hallett, Delia Hallett, and Samuel A. Martin, the relators, are the owners of a three-story building in the city of Seattle, containing twenty-seven apartments, each apartment consisting of a living room, kitchen, bath-room, and two closets. The building was piped for gas so that each apartment would have a separate service through a meter to be installed in a closet connecting with each bath-room, thus requiring twenty-seven meters. A main service pipe was installed in the basement, from which separate supply pipes extended throughout the building. The Seattle Lighting Company is a public service corporation engaged in selling illuminating and heating gas to the citizens of Seattle. When the building was about completed, the relators demanded of the lighting company that it connect the building with its mains, that it install a separate meter in each apartment, and that it furnish gas for the use of tenants. The defendant, contending that the building was not equipped with pipes in accordance with its rules for the installation of meters, refused to make the connections. Thereupon the relators applied to the superior court of King county for a writ of mandamus to compel a compliance with their demand. An alternative writ was issued and served. Upon trial a peremptory writ was denied, the action was dismissed, and a judgment for costs was entered in defendant's favor. The relators have appealed.

The respondent has moved to dismiss the appeal for the reason that the controversy has ceased. It is shown that, since the entry of the final judgment, the respondent has connected the building with its mains; that it has installed a single meter in the basement through which the entire building is served, and that the appellants and their tenants are being supplied with gas. The appellants on the trial contended that they were entitled to a separate meter in each apart-

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ment, and make the same contention in this court. The installation of a single meter does not afford them all the relief to which they claim they are entitled, and which they demand in this action. It is evident that the controversy has not ceased. The motion to dismiss is denied.

Appellants insist that, after the alternative writ was issued and served, the defendant failed to interpose any proper answer or return, which they insist it was required to do under § 1018, Rem. & Bal. Code; that no answer having been made, the averments of their complaint and the alternative writ were admitted, and that their motion for a peremptory writ should have been sustained. The record shows that one Silas Hutchinson, respondent's manager, made and filed an affidavit in answer to the complaint, in which he admitted and denied certain of its allegations, and also pleaded an affirmative defense. This instrument, although entitled an affidavit, was in its substance and effect an answer. It was so construed and regarded by the trial judge. Appellants made no motion to strike the affidavit, but demurred to it orally and moved for judgment. Their demurrer and motion were both denied, and the cause was tried upon the merits. The appellants now contend that the affidavit should not have been considered as a pleading, in the absence of any formal answer. In support of this contention they cite *State ex rel. State Ins. Co. v. Superior Court*, 14 Wash. 203, 44 Pac. 131, in which this court said:

"It seems very clear that respondent has not answered in the manner required by the statute. For that reason, we are not authorized to consider the affidavits so submitted. It follows that the writ must issue if the facts set up in the petition are sufficient to authorize it."

We have examined the record in the case cited. It shows that an original application was made to this court for a writ of prohibition; that the respondent demurred to the relator's affidavit, and that no other appearance was made. No affidavit was interposed on respondent's behalf purporting to be

an answer. The affidavits mentioned in the opinion were made by third parties in support of facts not alleged and not in issue. The only issue before this court was one of law. The affidavits, in the absence of any issue of fact or any instrument purporting to be an answer, were properly ignored. The affidavit now before us is an answer in its substance and effect. Were it to be amended by striking the word "affidavit" and inserting in lieu thereof the word "answer," it would be, as we think it is now, a sufficient answer to the regulators' affidavit or complaint. It was so regarded by the trial judge. The cause was tried upon the issues of fact thus raised, and there is no merit in appellants' present contention.

The affidavit which we hold to be an answer, alleged that the respondent in the conduct of its business has adopted a rule requiring its customers, owners of apartment houses or other buildings in which it is necessary to install more than one meter, to provide a separate meter room on each floor, or in the basement, where all meters may be installed. It insists that this is a reasonable rule, and that the appellants have refused to comply with it. We find that the appellants were notified of this rule before they commenced the erection of their building; that they refused to comply with it; that they so installed their plumbing as to prohibit the use of more than one meter without its violation, and that, prior to the commencement of this action, the respondent offered to install a single meter in the basement and supply gas to appellants and their tenants, but that they insisted upon the installment of twenty-seven separate meters located in the several apartments. There is a sharp conflict in the evidence, but the oral opinion of the trial judge, which is incorporated in the statement of facts, and the recitals of the judgment show that he also found the facts as above stated.

"A gas company may, in the discharge of its duties to the consumer, govern its action by reasonable rules and regulations, and when it has done so all persons dealing with it, as

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well as the company itself, must yield obedience thereto. Since, however, the business of supplying gas to consumers as generally conducted is effected with a public interest, the rules and regulations of a gas company must be applicable to all consumers alike." 20 Cyc. 1162.

The controlling question on this appeal is whether the rule adopted by the respondent is a reasonable one. The trial court found that it is, and from all the evidence we conclude that the finding must be sustained. Evidence was introduced by the respondent sufficient to show that it would be a much more sanitary arrangement to locate the meters in one enclosed room than to distribute them throughout the various apartments as demanded by appellants; that there would be less danger of explosions in case of fire; that leaks in the various pipes located in partitions throughout the building could be more readily found; that repairs in pipes serving the separate apartments could be made without interrupting the supply of gas to any apartment other than the one where the repair might be needed, thus avoiding unnecessary inconvenience to tenants; that collections from prepayment meters could be more readily and easily made, and that the high city pressure, which would not extend beyond the meters when installed, could be confined to the main service pipes. Although the evidence on these various points was in sharp conflict, the trial judge accepted and credited that offered on behalf of the respondent, and we cannot conclude that he erred in so doing. His conclusion that the rule was a reasonable one and should be enforced must be sustained.

Appellants contend that the respondent has not uniformly enforced the rule in question; that it has waived compliance in a number of cases, and that it cannot enforce it against one consumer unless it does so against all. The evidence does not sustain this contention. The rule has been in existence only one or two years. Some consumers had piped their buildings for meters in separate apartments before being informed of its adoption by respondent, or having any knowl-

edge thereof. Under these circumstances, the respondent did in a few instances waive the rule, but it has invariably refused to do so where the consumer had notice of the regulation before piping his building, as the appellants undoubtedly did in this case. The rule is being strictly enforced.

Appellants now insist that in any event they were entitled to a writ of mandamus compelling the respondent to make a connection with its mains, to install a single meter, and to supply appellants and their tenants with gas; that the trial court erred in dismissing the action, and that a peremptory writ should have been issued affording relief to this extent, although not all the relief demanded. There is no doubt but that less relief can be awarded by writ of mandate than was originally demanded, where the relator is entitled to such partial relief. *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797. The record before us shows, and the trial court found, that prior to the commencement of this action, and again on its trial, the respondent offered to connect the building with its mains, to install a single meter and to furnish gas. The appellants, in effect, rejected this offer by proceeding with the trial upon the theory that they were entitled to a writ compelling the installation of twenty-seven separate meters in the manner demanded. They are in no position to now insist upon a reversal for the purpose of avoiding costs. Upon the filing of the remittitur, they may if they so desire, but without costs to respondent, have an order entered requiring a continuance of the service and supply through the single meter which is now installed.

The judgment is affirmed.

RUDKIN, C. J., PARKER, MOUNT, and DUNBAR, JJ., concur.

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Syllabus.

[No. 8619. Department Two. September 10, 1910.]

**MATILDA SWANSON *et al.*, Respondents, v. PACIFIC SHIPPING
COMPANY, Appellant.¹**

APPEAL—RECORD—AFFIDAVITS. Unless an affidavit in support of a motion is attached thereto and clearly identified, it must be incorporated in a statement of facts or bill of exceptions in order to be considered on appeal.

SAME—APPEAL—RECORD—REVIEW—FINDINGS. A finding, on a motion to quash service of summons on a foreign corporation, that it was doing business in this state will not be disturbed on appeal in the absence of the record on which the finding was based.

ABATEMENT AND REVIVAL—WRONGFUL DEATH—SURVIVAL OF ACTION—SUBSTITUTION OF WIDOW. Under Rem. & Bal. Code, § 194, upon the death of a plaintiff, suing for personal injuries from which he afterwards died, his wife and minor children are properly substituted as parties plaintiff, to recover the damages which the plaintiff would have been entitled to had he lived.

SAME—CONSTRUCTION. Rem. & Bal. Code, § 194, providing that no action for personal injuries to any person occasioning his death shall abate by reason of his death if he leaves a wife or child, was not restricted to mean that no action commenced for wrongful death shall abate, by reason of the enactment at the same session of Id., § 183, as originally enacted, giving a widow and children an independent right of action for the wrongful death of the husband and father; but these sections are independent of each other.

APPEAL—REVIEW—HARMLESS ERROR—TRIAL—COMMENT ON EVIDENCE. A suggestion by the trial judge to change the form of a hypothetical question to harmonize with uncontradicted evidence then admitted is not prejudicial error as comment on the evidence, where the jury was cautioned to disregard any statement of the court and any mistake made was promptly corrected.

EVIDENCE—PERSONAL INJURIES—RES GESTAE—ADMISSIBILITY. In an action for personal injuries through the negligent acts of members of a ship's crew, a remark made by the captain of the vessel at the time to the effect that the crew would be killing some one next or had pretty near killed a man is admissible as part of the *res gestae*.

¹Reported in 110 Pac. 795.

APPEAL—REVIEW—VERDICT. The verdict of a jury finding upon conflicting expert testimony that death from gangrene of the lungs resulted from an injury will not be disturbed on appeal.

DAMAGES — PERSONAL INJURIES — EXCESSIVE VERDICT. A verdict for \$17,500 for personal injuries sustained by a ship carpenter 42 years of age earning \$100 a month, from which injuries he afterwards died, is excessive and should be reduced to \$10,000, the plaintiff's widow not being entitled in that action to any damages by reason of the death.

Appeal from a judgment of the superior court for King county, Gay, J., entered July 1, 1909, upon the verdict of a jury rendered in favor of the plaintiffs for \$17,230, for personal injuries sustained by a ship carpenter while working upon a vessel. Reversed, unless \$7,320 is remitted.

Roberts, Battle, Hulbert & Tennant and Hughes, McMicken, Dovell & Ramsey, for appellant.

Aust & Terhune, for respondents.

CROW, J.—This action was commenced on December 26, 1907, by Gust Swanson, now deceased, against Pacific Shipping Company, a corporation, to recover damages for personal injuries. After his death, which is alleged to have occurred as a result of his injuries, on February 9, 1909, Matilda Swanson, his widow, and his minor children by their guardian, were substituted as plaintiffs, filed a second supplemental complaint, and prosecuted the action. From a judgment in their favor, the defendant has appealed.

The Pacific Shipping Company is a corporation organized under the laws of California. It has no office in this state, has not complied with the laws of Washington by appointing a resident agent upon whom service of process may be made, contends that it has done no business in this state, and that it is not subject to the jurisdiction of the courts of this state. It is the owner of the schooner "Polaris," which under command of appellant's servant, one Captain O. V. Lindholm as master, was engaged in carrying freight. In the latter part of 1907, Captain Lindholm, in command of the vessel, entered

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into a contract with the Seattle Shipyards Company at Ballard for repairs. In pursuance of such contract, the vessel was placed upon the ways at Ballard. Gust Swanson, the original plaintiff herein, one of a number of ship carpenters employed by the shipyards company, was working about the keel on the outside of the vessel. While thus employed, he stood below a scaffold used by other ship carpenters, which was constructed by placing large heavy planks on trestles. This scaffolding was located near the rudder of the vessel. Repair work was being done on the keel by employees of the Seattle Shipyards Company. At the same time, the crew of the vessel were engaged upon her deck, doing certain work preparatory to unshipping and removing the rudder. While thus engaged they could not see Swanson and other employees of the shipyards company working on the keel below, but knew of their presence. When the crew were ready to move the rudder, it is alleged that they did so without warning to the workmen below. The rudder when swung struck a heavy plank on which it is alleged a ship carpenter was standing, pushed the plank from the trestle, and caused it to fall upon Swanson and injured him.

It was alleged that the employees of appellant were negligent in moving the rudder without first warning Swanson and the other employees of the shipyards company. Service of the original summons and complaint was made in King county upon Captain Lindholm as agent of the appellant. A motion, supported and resisted by affidavits, was interposed to quash this service, for the reason that it had not been made upon any agent, cashier, secretary or other officer of the appellant company, and that appellant is a foreign corporation which has never done any business, nor maintained any office, nor appointed any agent or officer in this state. This motion was denied and the appellant answered.

On September 18, 1908, Gust Swanson, the original plaintiff, was, by order of the superior court of King county,

adjudged insane and committed to the Western Hospital for insane at Fort Steilacoom. On November 10, 1908, his wife, Matilda Swanson, having been appointed and qualified as his guardian, and substituted as a party plaintiff, filed a supplemental complaint pleading his insanity, which she alleged had resulted from the injuries occasioned by appellant's negligence. Thereafter Gust Swanson died, and upon motion and affidavit of Matilda Swanson, the following order was made and entered on February 19, 1909:

"On reading the affidavit of Matilda Swanson filed herein, it appearing to this court that Gust Swanson died on the first day of February, 1909, and that he left surviving him a widow and minor children, for whom the said widow is now the duly qualified and acting guardian. It is now hereby ordered that the said widow in her own right and the said widow as guardian of said children hereinafter named be substituted as party plaintiff in this action, the title of said action hereafter to be Matilda Swanson individually and as the general guardian of Arthur Swanson, Albert Swanson, Adela Swanson, Gust Swanson, and Charlotte Swanson, minors, Plaintiff, v. Pacific Shipping Company, a corporation, Defendant, and that all proceedings in this action shall hereafter be so entitled."

On February 23, 1909, Matilda Swanson in her own behalf, and as guardian for the minor children, filed a second supplemental complaint in which she alleged that the insanity and death of Gust Swanson were occasioned solely by the injuries which resulted from the fault, negligence and carelessness of the appellant. The issues were completed, trial was had upon the amended complaint of Gust Swanson, the first and second supplemental complaints, the answers thereto, and the replies, and a verdict was returned in favor of the respondents for \$17,230, upon which judgment was entered.

Appellant's first contention is that the trial court erred in denying its motion to quash the summons and dismiss the action. It is admitted that the defendant is a foreign cor-

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poration; that it has no resident agent in this state, and that it has never complied with the laws of Washington by appointing an agent upon whom service of process may be made. Respondents contend that appellant was doing business in this state, and the trial court so found when it denied the motion to quash. It was admitted that the ship "Polaris," owned by the appellant, was in this state at Ballard in December, 1907; that it was in charge of Captain Lindholm as master; that appellant, by Lindholm as its agent, had contracted with the Seattle Shipyards Company for extensive repairs upon the vessel; that such repairs were being made; that during the performance of this contract within this state, the accident occurred, and that service of summons was actually made upon Lindholm in King county.

There seems to have been an issue on the hearing to quash, as to whether the "Polaris" was in this state solely by reason of some accident which occurred at sea and which made it necessary to put into port at Ballard for repairs, or whether she in fact came into Puget Sound in charge of Lindholm to contract for, receive and transport a load of lumber from some point near Bellingham.

It appears that the hearing of the motion was on affidavits, two of which, presented on behalf of the appellant, were attached to the motion and made a part thereof. None of the affidavits presented on behalf of the respondents are in the record, either by incorporation in the transcript or by a statement of facts or bill of exceptions. One affidavit presented by appellant shows upon its face that it is in answer to the affidavits of A. W. Trowberg and William E. Froude, made on behalf of respondents and used on the hearing of the motion to quash. Neither of the affidavits made by Trowberg and Froude appears in the transcript, nor have they been made a part of the record by any statement of facts or bill of exceptions. Where an affidavit is clearly identified as a part of a motion to which it is attached, it becomes a part of the record without being incorporated in a statement of

facts or bill of exceptions. *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

But other affidavits not so attached and used upon the hearing of the motion can only be made a part of the record by bill of exceptions or statement of facts. Respondents' affidavits have not been thus made a part of the record. Reference seems to be made to them in the briefs, but we could not consider them even though they were included in the transcript, from which they have been omitted. It is impossible for us to know what proof was made by respondents' affidavits relative to any business transacted by the appellant in this state. As heretofore stated, the trial court evidently found that it was so transacting business, and we cannot conclude that the evidence contained in the affidavits, not a part of the record and which we cannot now consider, did not support such finding. The order denying the motion to quash must, upon the record, be sustained.

Appellant next contends that the trial court erred in denying its motion to strike the first and second supplemental complaints, in overruling its demurrer to the second supplemental complaint, in permitting the substitution of Matilda Swanson and the minor children as plaintiffs, and in allowing the cause to be continued and prosecuted in their names. Respondents insist that they were entitled to be so substituted to continue the action and recover damages, not for the death of Gust Swanson, but such damages as he could have recovered had the cause been tried at any time prior to his death. The case was tried, evidence was admitted, and the jury were instructed upon this theory. Respondents predicate their arguments in support of the procedure adopted, upon § 194, Rem. & Bal. Code, which reads as follows:

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the

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time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor of his parents, sisters or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death."

It seems to us that this section is not susceptible of construction. If under its provisions the wife and children could not be substituted as parties plaintiff, and continue the prosecution of the action, it would necessarily abate, contrary to the direct prohibition of the section itself. In order that the prosecution of the same action might be continued by the wife and children, it was necessary for them to allege, and afterwards prove, that the identical injuries for which Gust Swanson had sued caused his death. In other words, if his death resulted from any other cause, or did not result from such personal injuries, the action would abate. The respondents, therefore, alleged and introduced evidence to show that his death was occasioned solely by the injuries for which he had sued. They did so, not to sustain any claim for damages resulting from his death, but to show facts which became a necessary condition precedent to their continuance and prosecution of the action.

Appellant calls attention to the fact that § 194, *supra*, was first enacted in 1854; that § 183, Rem. & Bal. Code, giving a right of action to the widow or widow and children for the wrongful death of the husband and father, was originally enacted in the same year, and earnestly contends that these two sections disclose an intention on the part of the legislature to give the wife and children a right of action for the wrongful death of the husband and father; that the words, "No action for personal injury to any person occasioning his death shall abate," contained in § 194, *supra*, mean that no action commenced for wrongful death shall abate, but that it—the action for wrongful death—may be prosecuted or commenced in fa-

vor of the wife or children; and that when enacting § 194 the legislature did not intend to give the wife and children a right of action for the indential damages the husband and father would have recovered in his action, had he survived until trial and judgment. We regard this as an inconsistent and strained construction, which would result in the complete abrogation of § 194 by rendering it utterly nugatory. Both sections were originally enacted in one and the same statute. Each was intended to serve its separate purpose, and must be so construed as to secure that result. The trial court committed no error in allowing the substitution of parties plaintiff, in permitting the filing of the supplemental complaint, or in the theory upon which it admitted evidence, instructed the jury, and tried the case.

Appellant further contends that the trial judge erred in commenting upon the facts and evidence in the presence of the jury, and in referring during the trial to matters pertaining to the case and its merits in such a manner as to prejudice the appellant. We find no error in this regard. The most serious offense, according to appellant's contention, was a suggestion made to appellant's attorney by the trial judge, without previous objection from the respondents, that a change be made in the form of a hypothetical question so that it would assume that a workman was standing on the plank when it struck Swanson. At the time the suggestion was made, it was in harmony with the uncontradicted evidence then admitted. It would perhaps have been more prudent for the trial judge to have refrained from any criticism upon the form of the question, in the absence of objection by respondents' attorney. Appellant immediately excepted. The jury were then withdrawn at the instance of the court, and in their absence considerable discussion occurred relative to the form of the question and the facts then proven. Upon the return of the jury, the question was modified, and the court promptly informed the jury that they should be influenced only by the evidence, and not by any statement of the court.

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Later, in a deposition introduced by appellant, a witness testified that no one was on the plank when it fell. Thereupon the court remarked: "I desire to say to the jury and counsel that had this deposition been read before the court interrupted you on your hypothetical question, the court would not have interrupted you. The question you asked at that time would probably have been permitted under your theory of the case. I understand now, but the court misunderstood your theory of the case."

Upon this record, we cannot hold that the trial judge was guilty of such misconduct as to necessitate a reversal of the judgment and the granting of a new trial. His evident desire was to be impartial. By his prompt and proper instruction to the jury he so fully corrected any mistake he might have made as to remove the possibility of prejudice.

The workmen who without warning caused the rudder to strike the plank were members of the ship crew, in the sole employment of the appellant. Over appellant's objection, one of respondents' witnesses was permitted to testify to a statement made by Captain Lindholm immediately after the accident as follows: "The captain says to the mate, he sung out, 'What are you doing up there? You be killing some one here pretty soon, pretty nigh killed a man now.'" Another witness for respondents, over appellant's objection, testified to the statement made by the captain as follows: "Why he say, what are you doing? You will be killing some one next. You have pretty nearly killed one man now." Appellant contends that these statements, if made, were mere matters of opinion, that they were not proper evidence, and that their admission was erroneous. The statements were made by the captain at the time of the accident, and under the repeated rulings of this court were admissible as a part of the *res gestae*. *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111; *Lambert v. La Conner Trad. & Transp. Co.*, 30 Wash. 346, 70 Pac. 960; *Dixon v. Northern Pac. R. Co.*, 37 Wash. 310, 79 Pac. 943, 107 Am. St. 810, 68 L. R. A. 895; *Starr v. Aetna Life*

Ins. Co., 41 Wash. 199, 82 Pac. 113, 4 L. R. A. (N. S.) 636; *Walters v. Spokane International R. Co.*, 58 Wash. 293, 108 Pac. 593.

Appellant contends that it was not guilty of negligence, as a warning was in fact given by officers of the ship before the crew moved the rudder. This contention cannot be sustained. The evidence, while conflicting, is clearly sufficient to support a finding that no warning was given, and that the appellant, by reason of such omission, was negligent.

In order that the respondents might continue the prosecution of this action to judgment it was, as above stated, necessary for them to allege and prove that the death of Gust Swanson resulted from the injuries caused by appellant's negligence. The appellant contends that the evidence was not sufficient to sustain that allegation, but that it does show that he died from gangrene of the lungs, which did not, and could not, result from the injuries he had received. The trial judge, in substance, instructed the jury that unless they found, as pleaded in the second supplemental complaint, that his death did result from the accident and injuries pleaded in the original complaint, the respondent could not recover. The verdict returned shows that the jury so found, and the evidence, although in sharp conflict, is sufficient to sustain such finding. No good purpose would be served by repeating the evidence. It is voluminous, much of it being expert testimony of a scientific and technical character given by physicians and surgeons. It appears that Swanson, at all times prior to the accident, was a strong, healthy man, weighing about 170 pounds, and that he was steadily employed at heavy work. Not a suggestion of any previous ailment or physical defect appears in the record. He was struck on the head and shoulders. There is evidence that he suffered a concussion of the brain; that he was injured about his shoulders; that a double hernia soon appeared; that he never worked again; that he went into a steady decline; that he ran down to about 130 pounds in weight; that

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he became incurably insane; that he was taken to the state hospital; that he developed gangrene of the lungs, with which he was afflicted at the date of his death, which occurred about thirteen months after the accident. Appellant contends, and offered expert evidence to show, that neither the hernia nor the gangrene of the lungs could have resulted from the original injuries, while respondents introduced expert evidence tending to sustain their position that all ailments with which he was afterwards afflicted and which caused his death were the direct result of the accident. Upon this conflicting evidence the jury found in favor of the respondents, and their finding cannot be disturbed.

What has heretofore been said disposes of all the other assignments of error, except appellant's contention that the verdict is excessive, which must be sustained. It appears that Swanson was a man 42 years of age, in excellent health and condition at all times prior to the accident; that he was earning \$100 a month, and that the accident resulted in the injuries heretofore stated. As this cause is not prosecuted by the respondents to recover damages resulting to them by reason of the death of Swanson, but is prosecuted as a continuation of the action commenced by him for the damages which he could have recovered had the cause been tried prior to his death, we cannot consider his death as an element of damage. Under the peculiar circumstances of this case, it is somewhat difficult to measure the damages which he would have been entitled to recover had he lived until the trial. Much latitude must be accorded to a jury in measuring and fixing damages to be awarded in a case of this character, but their verdict should not be permitted to stand for any award in excess of compensation. We conclude from the entire record, that a verdict in excess of \$10,000 should not be sustained. It is ordered that if within thirty days after the filing of the remittitur, the respondents shall remit all damages in excess of \$10,000, that the judgment for that sum with interest from the date of trial be affirmed; otherwise that

a new trial be granted. The appellant will recover its costs in this court.

RUDKIN, C. J., PARKER, MOUNT, and DUNBAR, JJ., concur.

[No. 8866. Department Two. September 10, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE MCFARLAND, *Appellant*.¹

CONSTITUTIONAL LAW—CLASS LEGISLATION — HOTELS—INSPECTION —CLASSIFICATION. Rem. & Bal. Code, §§ 6030-6049, providing for the inspection of inns, hotels, and public lodging houses having ten or more rooms does not provide an unreasonable classification and does not violate the constitutional prohibitions against class legislation, the deprivation of property without due process of law, the delegation of legislative powers, or the invasion of private rights.

CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT — HOTELS — PAYMENT OF INSPECTION FEE. Rem. & Bal. Code, § 6046, making it a misdemeanor, punishable by fine or imprisonment, for a hotel keeper to refuse to pay the annual fee for hotel inspection, violates Const., art. 1, § 17, forbidding imprisonment for debt.

STATUTES — PARTIAL INVALIDITY — EFFECT. The constitutionality of § 6146, Rem. & Bal. Code, providing imprisonment for failure to pay the hotel inspection fee, does not affect the validity of the balance of the act providing for the inspection of inns and hotels.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered April 15, 1910, upon a trial and conviction of refusing to pay a hotel inspection fee. Reversed.

Percy Gardiner, for appellant, contended, among other things, that the classification was arbitrary and unreasonable. *Bailey v. People*, 190 Ill. 28, 60 N. E. 98, 83 Am. St. 116, 54 L. R. A. 838; *Bacon v. Locke*, 42 Wash. 215, 83 Pac. 721; *State v. Ide*, 35 Wash. 576, 77 Pac. 961, 102 Am. St.

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914, 67 L. R. A. 280; *Harding v. People*, 160 Ill. 459, 43 N. E. 624, 52 Am. St. 344, 32 L. R. A. 445; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79; *State v. Haun*, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369; *Bonnett v. Vallier*, 136 Wis. 193, 116 N. W. 885, 128 Am. St. 1061, 17 L. R. A. (N. S.) 486; *In re Eight-Hour Bill*, 21 Colo. 29, 39 Pac. 328; *Low v. Rees Printing Co.*, 41 Neb. 127, 59 N. W. 362, 43 Am. St. 670, 24 L. R. A. 702; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188, 10 S. E. 288, 25 Am. St. 891, 6 L. R. A. 359; *In re Ah Fong*, 3 Sawyer (U. S.) 144, Fed. Case No. 102, 13 Am. Law Reg. (N. S.), 761, 3 Am. Law Rec. 403; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Finders v. Bodle*, 58 Neb. 57, 78 N. W. 480. This regulation of hotels is not a proper exercise of the police power. *Lochner v. New York*, 198 U. S. 45; *Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707, 75 Am. St. 93, 48 L. R. A. 261; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Spokane v. Macho*, 51 Wash. 322, 98 Pac. 755; *Spellman v. New Orleans*, 45 Fed. 3.

Ralph C. Bell and *O. T. Webb*, for respondent.

Crow, J.—On April 1, 1910, the prosecuting attorney of Snohomish county filed an information against the defendant, George McFarland, which contained the following charge:

"That on or about the 3d day of March, 1910, in the county of Snohomish, state of Washington, the above named defendant, George McFarland, was the person in charge of the certain hotel commonly known and designated as the 'Mitchell Hotel', in the city of Everett, county of Snohomish, state of Washington; that said Mitchell Hotel then and there was a hotel containing more than twenty (20) rooms and less than one hundred (100) rooms for the accommodation of the public, and was then and there used, maintained, advertised and held out to the public to be an inn, hotel, public lodging house, and place where sleeping accommodations were furnished for hire to transient guests; that one W. L. Gritman

was then and there a duly appointed, qualified and acting deputy inspector for the state of Washington; that said W. L. Gritman, as such deputy inspector aforesaid, did then and there proceed to make, and did make, an inspection of said 'Mitchell Hotel' as provided by law; that said defendant George McFarland, did then and there unlawfully neglect to pay to said W. L. Gritman as such deputy hotel inspector aforesaid, the fee provided by law for such inspection, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington."

A demurrer to the information being overruled, the defendant was adjudged guilty of refusing to pay the legal inspection fee, was punished by the imposition of a fine and costs, was remanded to the custody of the sheriff for detention until payment, and has appealed to this court.

Appellant attacks the constitutionality of chapter 29, Session Laws of 1909, page 43, entitled, "An Act relating to hotels, inns and public lodging houses, creating the office of state hotel inspector, and providing penalties for the violation thereof, and making an appropriation therefor;" the same being §§ 6030 to 6049 inclusive, Rem. & Bal. Code. He contends that the entire act is unconstitutional and void. He insists that it makes an unreasonable, arbitrary and illegal classification of inns, lodging houses and hotels; that it deprives him and other citizens of this state, of liberty and property without due process of law; that it denies them the equal protection of the law; that it delegates legislative powers to an individual; that it is an invasion of private affairs, and that it provides for imprisonment for debt.

Section 1 of the act defines hotels as follows:

"Every building or structure kept, used or maintained as, or held out to the public to be an inn, hotel, or public lodging house or place where sleeping accommodations are furnished for hire to transient guests, whether with or without meals, in which ten (10) or more rooms are used for the accommodation of such guests, shall for the purpose of this act be defined to be a hotel, and whenever the word hotel shall occur in this act it shall be construed to mean every such structure as is described in this section."

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Section 2 provides that every hotel more than two stories high shall be provided with certain halls, with iron fire escapes of specified size and construction, with ways of egress to such fire escapes, and also provides for the posting of notices calling attention to, and directing the way to, such fire escapes. Section 4 provides for the maintenance of certain fire protection. Section 10 provides for drainage, plumbing, and other sanitary protection. Section 12 creates the office of, and provides for the appointment of, an inspector of hotels, and fixes his salary. Section 13 authorizes the inspector to appoint deputies and prescribe their compensation. Section 17 reads as follows:

"Any owner, manager, agent or person in charge of a hotel who shall obstruct or hinder an inspector in the proper discharge of his duties under this act, *or who shall refuse or neglect to pay the fee for inspection prescribed herein shall be guilty of a misdemeanor*, and upon conviction thereof shall be fined not less than ten dollars (\$10) nor more than one hundred (\$100) dollars or shall be imprisoned in the county jail for not less than ten days, nor more than three months or both." (Rem. & Bal. Code, § 6046.)

Section 19 fixes inspection fees to be paid by the hotel keeper, as follows:

"Every hotel containing twenty (20) rooms or less, for the accommodation of the public, shall pay an annual inspection fee of five dollars (\$5) when inspected under the provisions of this act, and every hotel containing more than twenty (20) and less than one hundred (100) rooms for the accommodation of the public shall pay an annual inspection fee of ten dollars (\$10), and every hotel containing one hundred (100) rooms or more shall pay an annual inspection fee of twenty dollars (\$20) when inspected under the terms of this act. Such fees shall be collected by the inspector at the time of inspection, and if not paid on demand the inspector or deputy may sue therefor in his own name for the use of the state, and in such case the court shall allow and enter as a part of the judgment against the defendant all the costs of such action, including a reasonable fee for any attorney necessarily employed in such action by the in-

spector. All moneys collected under the provisions of this act shall be paid into the state treasury in the manner provided by law."

The first question presented for our consideration is whether the definition and classification of hotels adopted for the purposes of this act, based upon the use of ten or more guest rooms, is arbitrary, unreasonable and invalid.

"Class legislation, often called local or private legislation, consists of those laws which are limited in their operation to certain individuals or corporations or to certain districts of the territory of the state. Although from its nature this species of legislation must cast extra burdens on some and relieve others from burdens, yet aside from state inhibitions it has been held to be constitutional when the line drawn between two persons or places is reasonable." 8 Cyc. 1051.

Unless all hotels, without regard to the number of rooms used for the accommodation of guests, whether one or one hundred or more, must be brought within the operation of the law to preserve its constitutionality and to avoid the charge of invalid class legislation, it is manifest that some classification must be adopted to distinguish them. If any such classification can be sustained, it rests entirely within the discretion of the legislature to determine and establish its basis, and its determination when expressed in statutory enactment cannot be questioned successfully, unless it is so manifestly arbitrary, unreasonable, inequitable, and unjust that it will cause an imposition of burdens upon one class to the exclusion of another without reasonable distinction. The legislature, within the limitations of an exercise of a reasonable discretion, is required to base its classification upon some practical consideration suggested by necessity. Any class created by legislative enactment and subjected to the operation of the law must be such as to embrace all persons or corporations in like circumstances or situation. The classification must be practical, reasonable and certain, not factitious, arbitrary, or unjust. To be constitutional it must be

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predicated upon such a substantial distinction as suggests needed legislation relative to one class as distinguished from another.

In *Hubbell v. Higgins* (Iowa), 126 N. W. 914, the supreme court of Iowa, having under consideration a similar statute pertaining to the inspection and regulation of hotels, in an able opinion, which we adopt and follow, sustained the entire act, with the single exception hereinafter mentioned. Discussing class legislation, Evans, J., speaking for the Iowa court, well said:

"Classification must be reasonable and based upon real differences in the situation, conditions, and tendencies of things. If there is no real difference between persons, occupations, or property, the state cannot make one in favor of some persons over others.

"The true practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggest the necessity or propriety of different legislation with respect to them. *State v. Garbroski*, 111 Iowa, 496, 82 N. W. 959, 56 L. R. A. 570, 82 Am. St. Rep. 524; *Bailey v. People*, 190 Ill. 28, 60 N. E. 98, 54 L. R. A. 838, 83 Am. St. Rep. 116; *State v. Cooley*, 56 Minn. 540, 58 N. W. 150; *State v. Mitchell*, 97 Me. 66, 53 Atl. 887, 94 Am. St. Rep. 481; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800.

"Legislation which affects alike all persons similarly situated is not class legislation. *Sisson v. Board of Supervisors*, 128 Iowa, 464, 104 N. W. 454, 70 L. R. A. 440; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578.

"It is not denied but that some classification is desirable and proper, and that some line of division may be reasonably adopted as limiting the application of the law. Can it be said that the line of division which is provided in the statute is based upon a natural reason and one in harmony with the necessities of the situation. There is a sense, it is true, where the adoption of ten as the minimum number is arbitrary; that is to say, the legislature might as reasonably have adopted

the number 9 or the number 11 or even a larger or a smaller number. But this fact does not render the act arbitrary in a legal sense. It was essential to the practicability of the enactment that some fixed limitation be provided. Such limitation must be based upon a natural rather than an arbitrary reason. If the limitation adopted was a natural and reasonable one, it would be none the less so because some other limitation could have been adopted in lieu thereof.

"It seems quite clear to us that the limitation adopted in this act was natural and reasonable and was in harmony with the necessity of the situation. This provision of the act is manifestly based upon the assumption that the peril to the life and safety of guests is somewhat proportionate to the size of the hotel. We cannot say that this is an unreasonable assumption. On the contrary, it impresses us otherwise. If a fire were to obtain in a hotel containing a thousand rooms occupied by guests, surely the problem of rescue confronting the public authorities in such a case would be immensely more difficult than would be that presented by a like situation in a building containing only a few rooms and guests."

Further discussion of the statute contained in the opinion and not here quoted may be profitably examined and considered. All constitutional objections which the appellant now makes are considered and determined by the Iowa court. Following their opinion, we hold that appellant's objections to the validity of our statute are without merit, save and except his single contention that section 17 by its provisions in effect subjects appellant to imprisonment for debt, in violation of section 17, article 1 of the state constitution. The legislature had authority to fix inspection fees, to provide for their payment, and to authorize their collection by the inspector in a civil action. In passing on section 16 of the Iowa statute, similar to section 17 of our act, the supreme court of Iowa in *Hubbell v. Higgins, supra*, said:

"It is said that under this section a mere failure on the part of the hotel keeper to pay the inspection fee is made a misdemeanor, and that this is so, even though he comply with every other requisite of the law, and that the effect of such provision is to subject the hotel keeper to imprisonment for

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failure to pay a debt. We think this contention must be sustained. That is to say, that part of section 16 which makes a mere failure to pay the inspection fee a misdemeanor punishable by fine and imprisonment is clearly unconstitutional as being a violation of section 19, article 1, of the constitution of this state, which forbids imprisonment for a debt. See *Chauvin v. Valiton*, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194. It is also clear to us, however, that this provision is not essential to the integrity of the act as a whole, and that its elimination does not carry down with it the rest of the enactment. We do not find that the act under consideration in any other respect contravenes any provision of the constitution either of Iowa or of the United States."

An entire statute will not be held invalid by reason of a single unconstitutional provision which is not essential to its purposes and validity as a whole. In this case the entire act, purged of the single invalid feature which provides for imprisonment for debt, can and must be sustained. The only alleged criminal offense, with the commission of which the appellant has been charged, is that he did not pay the inspection fee. He cannot be fined nor imprisoned for any such act, as it cannot be made a criminal offense. The demurrer to the information should have been sustained.

The judgment is reversed, and the cause remanded with instructions to sustain the demurrer.

RUDKIN, C. J., MOUNT, and PARKER, JJ., concur.

[No. 8787. *En Banc*. September 10, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. MARTIN
STRASBURG, *Appellant*.¹

INSANE PERSONS—CRIMINAL LAW—INTENT. Under the common law, intent was necessary to constitute a criminal act, and hence an insane person incapable of forming a criminal intent was not responsible for crime.

JURY—RIGHT TO JURY TRIAL. Const., art. 1, § 21, providing that the right to trial by jury shall remain inviolate, means that the right, as it existed in the territory when the constitution was adopted, shall continue unimpaired and inviolate.

INSANE PERSONS—CRIMINAL LAW—QUESTION OF FACT. The question of the insanity of the accused at the time of the commission of the act charged is one of fact.

CONSTITUTIONAL LAW—DUE PROCESS—CRIMINAL LAW—RIGHT TO JURY TRIAL. The "due process clause" of the constitution taken in connection with art. 1, § 21, providing that the right to trial by jury shall remain inviolate, means that there can be no due process depriving one of life or liberty upon a criminal charge without a trial by jury as the right existed in the territory at the time of the adoption of the constitution, upon all questions of fact, and this includes the substantive fact of the sanity of the accused at the time of the act charged; hence Rem. & Bal. Code, § 2259, providing that insanity shall be no defense to crime, and that no evidence thereof shall be admitted, is void.

CRIMINAL LAW—INTENT—INSANITY. The power of the legislature to eliminate the element of intent in defining crime cannot be exercised to the extent of preventing an accused from invoking the defense of insanity at the time the act was committed and excluding evidence thereof.

SAME—"PUNISHMENT." The theory that "punishment" for crime is not within the present-day humanitarian conception of the proper treatment of criminals, and is contrary to the spirit of modern law, cannot uphold a statute authorizing the restraint of the criminal insane, where the act provides that such person be "punished" by imprisonment.

CRIMINAL LAW—INSANITY—RESPONSIBILITY—PROCEDURE—TRIAL—STATUTES—CONSTRUCTION. Construing together Rem. & Bal. Code, § 2259, providing that insanity is no defense to crime, and § 2283,

¹Reported in 110 Pac. 1020.

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Citations of Counsel.

providing that whenever, in the judgment of the court trying the same, any person convicted of a crime shall have been at the time of its commission, unable, by reason of insanity to comprehend the nature of the act, the court may direct such person to be confined in a state hospital for treatment, and providing for the determination of the question of sanity by the court, it will be held, in order to sustain the constitutionality of the act, that the legislature did not intend to punish an insane person for crime, but only intended to change the method for determining the issue of insanity.

CONSTITUTIONAL LAW—DUE PROCESS—LAW OF THE LAND. By "due process" and "the law of the land", is meant that life, liberty and property are to be held under the protection of the general rules that govern society.

SAME—DUE PROCESS—INSANE PERSONS—TRIAL OF ISSUE—NOTICE—PROCEEDINGS. Rem. & Bal. Code, § 2283, is lacking in every essential requirement of due process of law, in that it provides that a person charged with crime and insane at the time of the act charged, may, in the discretion of the court, without any charge of insanity, notice or trial, or opportunity to be heard in his defense, upon the courts own observation, or upon evidence *de hors* the record, upon any procedure adopted by the court, be committed to a hospital and deprived of his liberty.

CRIMINAL LAW—INTENT—POLICE POWER—INSANE PERSONS. While, under the police power, the legislature has a broad discretion in eliminating the element of intent in defining crime, a penal law fixing criminal responsibility upon the insane exceeds constitutional restraints; since a penal law is invalid where it punishes a man for an act which the utmost care and circumspection on his part would not enable him to avoid.

INSANE PERSONS—RESTRAINT—PUNISHMENT. An act providing punishment for the criminal insane by restraint beyond the necessities of protection to society after the complete restoration to sanity, is void.

MORRIS, J., dissents in part.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 23, 1909, upon a trial and conviction of assault in the first degree. Reversed.

Alfred Gfeller and *Wm. A. Holzheimer*, for appellant, to the point that insanity is a defense to crime, cited: 4, Blackstone, chap. 2, § 22; 4 Hammond Blackstone, chap. 2, §§ 24,

25; Broom, *Legal Maxims* (8th ed.), p. 14; *People v. Kleim*, 2 Lawson Crim. Defenses 36; *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; *State v. Marler*, 2 Ala. 43, 36 Am. Dec. 398, 402, and note; *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248, 88 Pac. 207; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242. The question of insanity is one of fact to be tried by a jury. *State v. Jones*, *Freeman v. People* and *State ex. rel. Mackintosh v. Superior Court*, *supra*.

George F. Vanderveer, for respondent, contended, among other things, that the police power vests in the legislature the power to define crime. Freund, *Police Power*; Tiedeman, *Limitations of Police Power*; *State v. Brown*, 37 Wash. 97, 79 Pac. 635, 107 Am. St. 798, 68 L. R. A. 889; *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851, 114 Am. St. 114, 5 L. R. A. (N. S.) 674; *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345; *In re Aubrey*, 36 Wash. 308, 78 Pac. 900, 104 Am. St. 952; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 15 Am. St. 460, 5 L. R. A. 559; *State v. Moore*, 104 N. C. 714, 10 S. E. 143, 17 Am. St. 696; *Mugler v. Kansas*, 123 U. S. 623; *State v. Richcreek*, 167 Ind. 217, 77 N. E. 1085, 119 Am. St. 491, 5 L. R. A. (N. S.) 874. Intent is not a necessary element of crime. *Morgan v. Nolte*, 37 Ohio St. 23, 41 Am. Rep. 485; *State v. Constatine*, 43 Wash. 102, 86 Pac. 384, 117 Am. St. 1043; *Colby v. Backus*, 19 Wash. 347, 53 Pac. 367, 67 Am. St. 732; *State v. Glinde-mann*, 34 Wash. 221, 75 Pac. 800, 101 Am. St. 1001; *State v. Zenner*, 35 Wash. 249, 77 Pac. 191. The plea of insanity under this statute belongs to the class of pleas in bar of sentence, and need not be submitted to a jury. *Baughn v. State*, 100 Ga. 554, 28 S. E. 68, 38 L. R. A. 577; *Nobles v. Georgia*, 168 U. S. 398.

E. C. Hughes, *Harold Preston*, *H. W. Craven*, *Milo A. Root*, and *George E. de Steiguer*, amici curiae. No insane man can be guilty of crime. *State ex rel. Mackintosh v.*

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Superior Court, 45 Wash. 248, 88 Pac. 207; *In re Boyett*, 136 N. C. 415, 48 S. E. 789, 103 Am. St. 944, 67 L. R. A. 972; *State v. Brown* (Utah), 102 Pac. 641; *Dexter v. Hall*, 15 Wall. 9; *People v. Farrell*, 31 Cal. 576. The police power is not without limitations, and the legislature may not so define a crime that with one person intent is essential, and with another it is not. The law is unequal and arbitrary. *In re Langford*, 57 Fed. 570; *Leeper v. Texas*, 139 U. S. 462; *Missouri v. Lewis*, 101 U. S. 22; *Taylor v. Porter*, 4 Hill (N. Y.) 140, 40 Am. Dec. 274; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Commonwealth v. International Harvester Co.*, 131 Ky. 551, 115 S. W. 703, 133 Am. St. 256; *In re Kemmler*, 136 U. S. 436; *In re Finley*, 1 Cal. App. 198, 81 Pac. 1041; *Ho Ah Kow v. Nunan*, Fed. Case No. 6,546; *State v. Lewin*, 53 Kan. 679, 37 Pac. 168; *Wally's Heirs v. Kennedy*, 10 Tenn. 554, 24 Am. Dec. 511; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642. Insane persons under this act do not receive the equal protection of the laws, being left to the arbitrary will of the judge. *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633; *In re Brown*, 39 Wash. 160, 81 Pac. 552, 109 Am. St. 868, 1 L. R. A. (N. S.) 540; *In re Boyett, supra*; *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. 524. A judicial inquiry into a person's sanity is essential to due process of law. 16 Am. & Eng. Ency. Law (2d ed.), p. 599; Black, Constitutional Law, 399; *In re Lambert*, 134 Cal. 626, 66 Pac. 851, 86 Am. St. 296, 55 L. R. A. 856; *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. 623, 45 Am. St. 912, 23 L. R. A. 737; *Marbury v. Madison*, 1 Cranch 137; *Yick Wo v. Hopkins*, 118 U. S. 356; *People ex rel. Witherbee v. Supervisors*, 70 N. Y. 228; *Ex parte Murray*, 35 Fed. 496; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. The essential elements of due process of law are notice and opportunity to defend. Black, Const. Law, pp. 424, 425, § 153; *Simon v. Craft*, 182 U. S. 427; *Phillips v. Postal Telegraph Cable Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. 868; *Portland v.*

Bangor, 65 Maine 120, 20 Am. Rep. 681; *Walker v. Sauvinet*, 92 U. S. 90; *People ex rel. Sullivan v. Wendel*, 33 Misc. Rep. 496, 68 N. Y. Supp. 948; *Davis v. United States*, 160 U. S. 469; *Wright v. Cradlebaugh*, 3 Nev. 341; *Charles v. City of Marion*, 98 Fed. 166; *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633; *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149, 53 Am. St. 868; *State v. Divine*, 98 N. C. 778, 4 S. E. 477; *In re Boyett*, and *State ex rel. Mackintosh v. Superior Court*, *supra*. The defendant was deprived of his right to trial by jury. *Cummings v. Missouri*, 4 Wall. 277; *In re Tiburcio Parrott*, 1 Fed. 481; *Railroad Tax Cases*, 13 Fed. 722, 732, 778; *Joseph v. Randolph*, 71 Ala. 499; *Wynehamer v. People*, 13 N. Y. 378; *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851, 114 Am. St. 114, 5 L. R. A. (N. S.) 674. The law imposes cruel punishment. 12 Cyc. 963; *Ho Ah Kow v. Nunan*, *supra*; Cooley, Constitutional Limitations (6th ed.), 402; Tiedeman, Limitations of Police Power, p. 21; *State v. Becker*, 3 S. D. 29, 51 N. W. 1018; *In re Finley*, *supra*; *State v. Driver*, 78 N. C. 423; *State v. Williams*, 77 Mo. 310; *McMahon v. State*, 70 Neb. 722, 97 N. W. 1035; *In re McDonald*, 4 Wyo. 150, 33 Pac. 18, 21; *Thomas v. Kincaid*, 55 Ark. 502, 18 S. W. 854, 29 Am. St. 68, 15 L. R. A. 558; *Johnson v. Waukesha Co.*, 64 Wis. 281, 25 N. W. 7; *State v. Burton*, 27 Wash. 528, 67 Pac. 1097; *State v. Bliss*, 27 Wash. 463, 68 Pac. 87; *State v. Mobley*, 44 Wash. 549, 87 Pac. 815.

PARKER, J.—The prosecuting attorney for King county by information charged the defendant with the crime of assault in the first degree, as follows:

“He, said Martin Strasburg, in the county of King, state of Washington, on the 3d day of September, A. D. 1909, did wilfully, unlawfully and feloniously make an assault upon one Otto Peeck with a firearm, to wit, with a revolver-pistol, then and there loaded with powder and ball, which he, said Martin Strasburg, then and there had and held, and did then and there wilfully, unlawfully and feloniously, with said

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revolver-pistol, shoot at, toward and into the body of said Otto Peeck, with intent then and there wilfully, unlawfully and feloniously to kill said Otto Peeck."

The offense charged by this information is defined by § 2413 of Rem. & Bal. Code, as follows:

"Every person who, with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another, shall assault another with a firearm or any deadly weapon, or by any force or means likely to produce death; . . . shall be guilty of assault in the first degree and shall be punished by imprisonment in the state penitentiary for not less than five years."

The trial resulted in a verdict of guilty against the defendant. His motion for a new trial being denied, judgment and sentence was rendered against him upon the verdict. From this judgment, the defendant has appealed.

The principal grounds relied upon by learned counsel for defendant to secure a reversal of the judgment are that the trial court erred in refusing to admit evidence tending to prove that the defendant, at the time charged as the commission of the crime, was insane and incapable of understanding the nature and quality of his act; and, also, that the court erred in instructing the jury, "that under the laws of this state it is no defense to a criminal charge that the person charged was at the time of the commission of the offense unable, by reason of his insanity, idiocy or imbecility, to comprehend the nature and quality of the act committed, or to understand that it was wrong."

In support of these rulings of the learned trial court, counsel for the state rely upon the provisions of § 7 of our new criminal code, Laws of 1909, p. 892; Rem. & Bal. Code, § 2259, providing as follows:

"It shall be no defense to a person charged with the commission of a crime, that at the time of its commission, he was unable by reason of his insanity, idiocy or imbecility, to comprehend the nature and quality of the act committed, or

to understand that it was wrong; or that he was afflicted with a morbid propensity to commit prohibited acts, nor shall any testimony or other proof thereof be admitted in evidence."

It is contended by learned counsel for appellant that this statute withholds from him rights guaranteed by our state constitution, and particularly those rights guaranteed by the following provisions thereof:

Art. 1, Sec. 3. "No person shall be deprived of life, liberty, or property without due process of law."

Art. 1, Sec. 21. "The right of trial by jury shall remain inviolate."

We are then confronted with the novel and grave question: Has the legislature the power under our constitution to enact a law taking away from a defendant accused of crime the opportunity to show in his defense the fact that, at the time of the commission of the act charged as a crime against him, he was insane, and by reason thereof was unable to comprehend the nature and quality of the act committed? We are not advised of any instance where the legislative power of any common law country has ever enacted a law prohibiting all consideration by the jury of the question of the insanity of the accused at the time of the commission of the act relied upon as the offense charged against him, when such insanity is sought to be shown in his behalf in connection with the question of his guilt. We believe it reasonably safe to assert that this is the first instance of any such enactment. This fact, of course, is not within itself a reason for holding that the legislature of our state has no such power; but in view of the source of our jurisprudence and the spirit of our institutions, this fact does furnish a reason for us to view this assumption of power with grave concern, and for a more than ordinary critical examination of its alleged source. This is indeed an occasion for heeding the admonition of the concluding section of our constitutional bill of rights, which reads:

"A frequent recurrence to fundamental principles is es-

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sential to the security of individual rights and the perpetuity of free government." Constitution, art. 1, § 32.

At the outset, then, let us recur to some fundamental principles touching the effect of the insanity of one accused of crime, at the time of committing the act charged against him, upon the question of his guilt. It is possible we may thus discover that the mental responsibility of the accused is a fact entering into the question of his guilt upon which he has a right of trial by jury, the same as upon any other fact inherent in that question; even as the fact that the muscular action of his physical body did or did not commit the physical act charged as a crime against him. In the text of Blackstone's Commentaries, vol. 4, pages 20, 21, and 24, it is stated:

"All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto may be reduced to this single consideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt; the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. . . .

"The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz., in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is, that '*furius furor solum punitur*.' In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself."

In 1 Russell on Crimes, page 2, it is said:

"Without the consent of the *will*, human actions cannot be considered as culpable; nor where there is no will to commit an offense, is there any just reason why a party should incur the penalties of a law made for the punishment of crimes and offenses."

The doctrine as understood in the United States is stated in 16 Am. & Eng. Ency. Law (2d ed.), p. 618, as follows:

"From the earliest period of the common law, no criminal responsibility could attach where the accused was so utterly deprived of reason as to be incapable of forming a guilty or criminal intent."

This is in accord with the view of our leading American text writers: 1 Wharton, Criminal Law (10th ed.), § 33; 1 Bishop, New Criminal Law, § 375; 1 McClain, Criminal Law, § 154. Mr. Tiedeman, in his work on State and Federal Control of Persons and Property, § 47, says:

"It is probably the rule of law in every civilized country, that no insane man can be guilty of a crime, and hence cannot be punished for what would otherwise be a crime. The ground for this exception to criminal responsibility is, that there must be a criminal intent, in order that the act may constitute a crime, and that an insane person cannot do an intentional wrong. Insanity, when it is proven to have existed at the time when the offense was committed, constitutes a good defense, and the defendant is entitled to acquittal."

In the case of *Commonwealth v. Rogers*, 7 Met. 500, 41 Am. Dec. 458, Chief Justice Shaw, speaking for the supreme judicial court of Massachusetts, said:

"In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts."

Mr. Freeman, the able editor of the American Decisions, in his note to *State v. Marler* (2 Ala. 43), 36 Am. Dec. 402, says:

"It was always a settled rule of the common law that a person could not be legally punished for any act committed by him while he was insane. . . . The common law never intended to inflict punishment upon one whom it believed to be insane

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at the time when he did the act charged as a crime. For the law holds that a criminal intent is an essential element in every crime, and if by reason of insanity a person be incapable of forming any intent, he cannot be regarded by the law as guilty."

In 12 Cyc. 164, the doctrine is stated in the text, in substantial accord with the above quotations, and there supported by a great array of cited authorities. Indeed, they are apparently unanimous. The doctrine has been recognized by our territorial supreme court, as well as by this court. *McAllister v. Territory*, 1 Wash. Ter. 360; *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248, 88 Pac. 207.

We have quoted from and cited authorities upon this question to this extent in order to show, not only how firmly fixed in our system of jurisprudence was this doctrine of incapacity of insane persons to commit crime at the time of the enactment of our criminal code of 1909, but, also, to conclusively show that, at the time of the adoption of our constitution, preserving the right of trial by jury inviolate, this doctrine was in full force in the territory of Washington as a part of the common law, unimpaired by judicial decision or legislative enactment. Referring to the declaration of our constitution that the right of trial by jury shall remain inviolate, this court, in *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 384, 47 Pac. 958, 58 Am. St. 39, said:

"The effect of the declaration of the constitution above set out is to provide that the right of trial by jury as it existed in the territory at the time when the constitution was adopted should be continued unimpaired and inviolate. *Whallon v. Bancroft*, 4 Minn. 109; *State ex rel. Clapp v. Minn. Thresher Mfg. Co.*, 40 Minn. 213, 41 N. W. 1020; *Taliaferro v. Lee*, 97 Ala. 92, 13 South. 125."

This appears to be the rule generally recognized by the authorities. 24 Cyc. 102.

From what has been said thus far, it seems too plain for argument that one accused of crime had the right, prior to and at the time of the adoption of our constitution, to show,

as a fact in his defense, that he was insane when he committed the act charged against him, the same as he had the right to prove any other fact tending to show that he was not responsible for the act. Indeed, his right to prove his insanity at the time of committing the act was as perfect even as his right to prove that his physical person did not commit the act, or set in motion a chain of events resulting in the act. These considerations suggest the application to our inquiry of the maxim, "*An act done by me against my will is not my act.*" 1 Bishop, New Criminal Law, § 288. The question of the insanity of the accused at the time of committing the act charged being one of fact when sought to be shown in his behalf, it needs no citation of authorities other than the foregoing to demonstrate that it is, and always has been, a question of fact for the jury to determine; as much so as any other question of fact bearing upon the responsibility of the accused for the occurrence of the act relied upon as constituting the offense charged. Such, beyond all question, was the right of all persons accused of crime at the time of, and prior to, the adoption of our constitution.

Our problem then is reduced to the question: Can the legislature under our constitution so circumscribe inquiry touching the question of the guilt of the accused as to exclude all consideration by the jury of his insanity at the time of committing the act? Now, this right of trial by jury which our constitution declares shall remain inviolate must mean something more than the preservation of the mere form of trial by jury; else the legislature could, by a process of elimination in defining crime or criminal procedure, entirely destroy the substance of the right by limiting the questions of fact to be submitted to the jury. In the case of *Cummings v. State of Missouri*, 71 U. S. 277, 325, Justice Field said: "The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." The

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correctness of this statement is too self-evident to require comment.

The due process of law provision of our constitution above quoted probably does not, of itself, mean right of trial by jury; but it does mean, in connection with the provision "The right of trial by jury shall remain inviolate", that there can be no such thing as due process of law in depriving one of life or liberty upon a criminal charge, except by a jury trial in which the accused may be heard and produce evidence in his defense, as that right existed at the time of the adoption of our constitution. It is not easy to define in general terms "due process of law" with such precision that we may at once see the exact limit of legislative power fixed by these words in the constitution; nor is it easy to define in general terms "the right of trial by jury", as guaranteed by the constitution, so that we may readily determine, in all cases, whether or not the legislature has violated this right. But in any event, it is clear that we must look beyond the letter, and give consideration to the spirit, of these provisions before we can hope to discover their true meaning. Judge Cooley, in commenting upon the phrases "due process of law", and "the law of the land", which he regards as meaning the same thing, in his *Constitutional Limitations* (7th ed.), 502, observes:

"If we examine such definitions of these terms as are met with in the reported cases, we shall find them so various that some difficulty must arise in fixing upon one which shall be accurate, complete in itself, and at the same time appropriate in all the cases. The diversity of definition is certainly not surprising, when we consider the diversity of cases for the purposes of which it has been attempted, and reflect that a definition that is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another.

"Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that

every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.'

"The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial.'"

The concluding words of this quotation seem very comprehensive; but they do not fully answer the problem we are here confronted with. The words "proceed upon inquiry" suggest the further question, inquiry of what? May such inquiry be so limited as to exclude therefrom any fact or facts the will of the legislature may dictate? If so, then the inquiry may be narrowed by the legislative will, to the ascertainment of some insignificant fact or facts by the jury, and the state still be able to successfully contend that the right of trial by jury has been preserved. This cannot be. The right of trial by jury must mean that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence. Otherwise this provision of our constitution, found, also, in varying language in all the constitutions of the Union, state and Federal—treasured by a free people for generations as one of the principal safeguards of their liberties—would be rendered void and utterly fail in the purpose which our people have always believed it was intended to accomplish.

Black, on Constitutional Law (2d ed.), 519, says:

"The constitutions were intended not merely to secure the right of trial by jury, but also to insure that it should be continued in existence as a substantial and valuable protective right to private suitors. Now it is evident that it would be entirely feasible for a state legislature, if so minded, to impose such onerous and oppressive restrictions or conditions upon this right as to make it practically unavailing to a party for his protection, yet without denying it in express terms. But this would be a palpable violation of the spirit

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and intent of the constitutional provision, and the courts would hold any such restrictions upon the right as not less unconstitutional than the total denial of it."

In the case of *People ex rel. Witherbee v. Supervisors*, 70 N. Y. 228, 234, Judge Folger, speaking for the New York court of appeals, said:

"Due process of law requires, that a party shall be properly brought into court, and that he shall have an opportunity when there, to prove any fact which, according to the constitution and the usages of the common law, would be a protection to him or his property."

This language was quoted with approval by the supreme court of Minnesota in *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. 524; *Plimpton v. Town of Somerset*, 33 Vt. 283; *King v. Hopkins*, 57 N. H. 334, 352; *Wynehamer v. People*, 13 N. Y. (3 Kernan), 378, 442.

We believe enough has been said to show that the sanity of the accused, at the time of committing the act charged against him, has always been regarded as much a substantive fact, going to make up his guilt, as the fact of his physical commission of the act. It seems to us the law could as well exclude proof of any other substantive fact going to show his guilt or innocence. If he was insane at the time to the extent that he could not comprehend the nature and quality of the act—in other words, if he had no will to control the physical act of his physical body, how can it in truth be said that the act was his act. To take from the accused the opportunity to offer evidence tending to prove this fact, is, in our opinion, as much a violation of his constitutional right of trial by jury as to take from him the right to offer evidence before the jury tending to show that he did not physically commit the act or physically set in motion a train of events resulting in the act. The maxim "An act done by me against my will is not my act," may, without losing any of its force, be paraphrased to fit our present inquiry as follows: "An act done

by me without my will, or in the absence of my will, is not my act."

Learned counsel for the state contend that the legislature has the power to eliminate the element of intent from any and all crimes, and that it can provide punishment for the commission of any act it chooses to define as criminal, regardless of the intent or want of intent with which such act may be committed. In support of this contention, we are cited to instances of laws relating to the sale of liquor to minors and Indians, and living off the earnings of a prostitute, and incest; under which it has been held that the want of intent on the part of the accused, and want of knowledge on his part as to the age or relationship of the person in connection with whom he commits the prohibited act, does not excuse him; as in *State v. Glindemann*, 34 Wash. 221, 75 Pac. 800, 101 Am. St. 1001; *State v. Zenner*, 35 Wash. 249, 77 Pac. 191; *State v. Constatine*, 43 Wash. 102, 86 Pac. 384, 117 Am. St. 1043. No doubt many other instances of this character might be cited; but none have been called to our attention, and we think the books do not contain any, where the constitutionality of a law has been sanctioned which conclusively imputes intent to commit crime to an insane person or withholds from him the right to prove in his defense that he was insane at the time of committing the act. It seems too elementary to call for citation of authorities to show that the general rule is now and has been for centuries, at least in all common law countries, that "there can be no crime without a criminal intent." *State v. Constatine, supra*; 4 Blackstone, 20; 1 Bishop, New Criminal Law, § 287; 1 McClain, Criminal Law, § 112. In a note to *People v. Flack* (125 N. Y. 324, 26 N. E. 267), 11 L. R. A. 807, the learned editor has collated authorities illustrating the rule and its exceptions.

While the general rule is subject to some exceptions, seemingly enabling the legislative power to eliminate the element of intent from certain crimes, as indicated by some of our previous holdings, it does not logically follow therefrom that

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an insane person can be rendered amenable to the *criminal laws* of the state, as long as those laws have in them the element of punishment, which we will notice later. We italicize the words "*criminal laws*", for we desire to emphasize the fact that we have not for a moment considered or had in mind what may be done in the way of restraining and caring for the insane under those humane laws enacted for that purpose, which, if not now sufficient to protect society and the insane, can easily be made so without infringing any constitutional right, by virtue of the abundant power residing in the legislature. We are now only concerned with the question of whether or not one accused of crime may be branded as a felon without any consideration whatever, by the jury trying him, of the question of his insanity at the time of committing the act charged against him. Whatever the power may be in the legislature to eliminate the element of intent from criminal liability, we are of the opinion that such power cannot be exercised to the extent of preventing one accused of crime from invoking the defense of his insanity at the time of committing the act charged, and offering evidence thereof before the jury. One so accused had this right at the time of the adoption of our constitution, and we are of the opinion that the question is so inherently related to the guilt or innocence of all accused persons that it cannot be now taken away from them without violating these guarantees of the constitution.

Since we conclude that the defendant has the right to have submitted to the jury the question of whether or not he was insane at the time of committing the act charged against him in connection with and as bearing upon the question of his guilt, we need not notice the provisions of § 2283, Rem. & Bal. Code, providing for the disposition of a convicted person who, in the judgment of the court trying him, was insane at the time of committing the act for which he was convicted, further than to observe that that section does not pretend to give to the accused the right to have the question of his in-

sanity submitted to the jury in connection with, and as bearing upon, the question of his guilt, but leaves the question of his insanity entirely to the trial judge. This, of course, is not a jury trial upon that question.

Finally, we will briefly notice the very able and ingenious argument put forward by learned counsel for the state, based upon the seeming assumption that the modern humane treatment of those convicted of crime practically removes them from the realm of punishment and places them in a position but little different from those other unfortunate members of society which the state is obliged to care for and restrain of their liberty; not because they have committed wrong, but because of their menace to society and themselves without fault of their own, the insane. Learned counsel's premise may be better understood by quoting from his brief as follows:

"The central idea upon which the whole fabric of criminal jurisprudence was formerly built was the idea that every criminal act was the product of a free will possessing a full understanding of the difference between right and wrong and full capacity to choose a right or wrong course of action, and, as one error naturally and logically follows another, it was only natural and logical that society should have prescribed punishments as a central feature of its scheme for correction. A better understanding of crime and the science of criminology now convinces us that this theory is wholly wrong,—that a dominant percentage of all criminals are not free moral agents, but, as a result of hereditary influences or early environments, are either mentally or morally degenerate or their crimes are committed under the degenerating influence of intoxicating liquor. An understanding of this fact has made readily apparent the folly of expecting that punishment could relieve the condition, and accordingly stocks, whipping posts and chain gangs are giving way to workhouses, reformatories and asylums, the purpose of which is to instruct, educate and reform rather than further to debase the individual; and the modern systems of criminal classification and segregation are themselves a recognition of the fact that every criminal is a concrete problem."

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Counsel then cites certain provisions of our laws providing in a measure for the classification and treatment of those convicted of crime, and continuing, argues that the purpose of these laws, "is to put in operation in this state a scheme of criminal jurisprudence which gives recognition to these ideas." The argument seems to be, in its last analysis, that because of modern humane methods in caring for and treating those convicted of crime, there is no longer any reason for taking into consideration the element of will on the part of those who commit prohibited acts, when their guilt is being determined for the purpose of putting them in the criminal class for restraint and treatment. Learned counsel's premise suggests a noble conception, and may give promise of a condition of things towards which the humanitarian spirit of the age is tending; yet the stern and awful fact still remains, and is patent to all men, that the status and condition, in the eyes of the world and under the law, of one convicted of crime is vastly different from that of one simply adjudged insane. We cannot shut our eyes to the fact that the element of punishment is still in our criminal laws. It is evidenced by the words "*shall be punished*," found in this very section defining the crime here charged against appellant. It is evidenced by these or similar words characterizing the treatment which the law imposes upon those convicted of crime, in practically all parts of our criminal code prescribing the fate of the guilty. As long as this is the spirit of our laws, though it may be much mellowed in the treatment of the convicted, as compared with former times, the constitutional rights here invoked must be given full force and effect when an accused person is put upon trial to determine the question of his guilt of crime. We regret the necessity of holding that the legislature has exceeded its constitutional power; but we cannot escape the conclusion that § 2259, Rem. & Bal. Code, Laws of 1909, p. 891, § 7, has the effect of depriving the appellant of liberty without due process of law, especially

in that it deprives him of the right of trial by jury; and is therefore unconstitutional.

The judgment of the learned trial court is reversed, with direction to grant appellant a new trial.

Crow, and MOUNT, JJ., concur.

RUDKIN, C. J. (concurring).—Before discussing the validity of the legislative act under consideration, it becomes important to determine what the legislature has done, or attempted to do. Section 7 of the criminal code of 1909 (Rem. & Bal. Code, § 2259), declares that:

“It shall be no defense to a person charged with the commission of a crime, that at the time of its commission, he was unable by reason of his insanity, idiocy or imbecility to comprehend the nature and quality of the act committed, or to understand that it was wrong; or that he was afflicted with a morbid propensity to commit prohibited acts; nor shall any testimony or other proof thereof be admitted in evidence.”

If the act stopped here, there could be no question as to the legislative intent. For the first time in history, so far as we are advised, the legislature of a civilized state has attempted to place the idiot, who hath no understanding from his nativity, the imbecile and the insane, who have lost their understanding through disease or mental decay, and the sane man in the full possession of all his mental faculties, on an equal footing before the criminal law. But the legislature did not stop here. Section 31 of the act (Rem. & Bal. Code, § 2283), provides that:

“Whenever, in the judgment of the court trying the same, any person convicted of a crime shall have been at the time of its commission unable by reason of his insanity, idiocy or imbecility, to comprehend the nature and quality of his act, or to understand that it was wrong, or shall be at the time of his conviction or sentence insane or an idiot, or imbecile, such court may in its discretion direct that such person be confined for treatment in one of the state hospitals for the insane or in the insane ward of the state penitentiary,

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until such person shall have recovered his sanity. In determining whether any person convicted of a crime was at the time of the commission thereof unable by reason of his insanity, idiocy or imbecility to comprehend the nature and quality of his act, or to understand that it was wrong, or is at the time of his conviction or sentence insane or an idiot or imbecile, the court may take counsel with one or more experts in the diagnosis and treatment of insanity, idiocy and imbecility, and make such personal or other examination of the defendant as in his judgment may be necessary to aid in the determination."

When these two sections are construed together, we are prone to believe that the legislature did not intend to punish one for the commission of a crime, when by reason of his insanity, idiocy or imbecility, he was unable to comprehend the nature and quality of his act, or to understand that it was wrong; but rather that it intended to minimize the well-known evil resulting from the all too frequent interposition of the defense of insanity in homicide cases, where no other defense is available, by changing the time and mode of trial of the issue of insanity.

We reach this conclusion the more readily for the reason that any other construction of the statute would bring it in conflict with the constitution. Assuming, therefore, for the present, that the legislature simply intended to change the time and mode of trial of the issue of insanity, § 2283, *supra*, is lacking in every essential requirement of due process of law. No attempt has ever been made to give a complete and exhaustive definition of the phrase, "due process of law," or its equivalent, "the law of the land," and it has been said by the supreme court of the United States that it is the part of wisdom to leave their meaning to be evolved by the gradual process of judicial inclusion and exclusion as the case presented for decision shall require. *Davidson v. New Orleans*, 96 U. S. 97. The exposition, however, of the term, "due process of law," or, "the law of the land," by Mr. Webster, in *Dartmouth College v. Woodward*, 4 Wheat. 518, 581, has

generally been accepted by both courts and law writers, viz.,

“By the law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land.”

Measured by this definition, the deficiencies in the act under consideration become at once apparent. It provides that, whenever, in the judgment of the court trying the same, any person convicted of a crime shall have been at the time of its commission unable by reason of his insanity, idiocy, or imbecility, to comprehend the nature and quality of his act, or to understand that it was wrong, or shall be at the time of his conviction or sentence, insane, or an idiot or an imbecile, such court may in its discretion direct that such person be confined for treatment in one of the state hospitals for the insane or in the insane ward of the state penitentiary, until such person shall have recovered his sanity; but how is the court to form a judgment on the question of insanity, idiocy or imbecility? No such charge is preferred against the accused, and, under the express provisions of another section of the act, no testimony or other proof of the mental condition of the accused shall be admitted in evidence. The court must therefore base its judgment on the appearance of the accused, or on other matters *de hors* the record. But aside from this, the accused has no notice of the proceedings against him, no opportunity to offer testimony, or to be heard in his defense. The court may adopt its own procedure, free from all constitutional restraints, may counsel with experts if it will, or act as its own expert if it chooses. It is almost needless to say that such a proceeding is an absolute nullity, if the question of insanity be a material one.

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In *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 57 N. W. 206, 794, 48 Am. St. 524, the court had under consideration an act of the legislature of that state providing for the commitment of insane persons, and although the act was far more complete in its details than is the act now before us, it was held that it violated the due process clause of the state and Federal constitutions. In the course of its opinion, the court said:

"It follows that any method of procedure which a legislature may, in the uncontrolled exercise of its power, see fit to enact, having for its purpose the deprivation of a person of his life, liberty, or property, is in no sense the process of law designated and imperatively required by the constitution. And while the state should take charge of such unfortunates as are dangerous to themselves and to others, not only for the safety of the public, but for their own amelioration, due regard must be had to the forms of law and to personal rights. To the person charged with being insane to a degree requiring the interposition of the authorities and the restraint provided for, there must be given notice of the proceedings, and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to his personal liberty in the future. There must be a trial before judgment can be pronounced, and there can be no proper trial unless there is guaranteed the right to produce witnesses and submit evidence. The question here is not whether the tribunal may proceed in due form of law and with some regard to the rights of the person before it, but, rather, is the right to have it so proceed absolutely secured? Any statute having for its object the deprivation of the liberty of a person cannot be upheld unless this right is secured, for the object may be attained in defiance of the constitution, and without due process of law. . . . We are not speaking of what every honorable and humane officer would do when a case was before him, but of what the statute will permit an officer to do."

For these reasons, if the question of insanity is at all a material one under the statute, the procedure prescribed for its determination amounts to a palpable denial of due process of law. But if we must accept the view that the legislature

intended to abrogate the defense of insanity in its entirety, and to place the sane and the insane, the idiot, and the imbecile, on an equal footing before the criminal law, we are still of opinion that the act is unconstitutional and void. The state seeks to uphold it on two grounds. First, on the ground that it is within the police power of the state to eliminate the question of intent in all criminal cases; and second, on the ground that, under modern theories, the law-breaker is taken into custody by the state for his own amelioration and reformation, and not as a punishment for crime. In other words, that the theory of legal punishment for crime is a relic of a barbarous age. True it is that, in many cases, the person accused of crime does not intend to commit the particular act which constitutes the crime. Such is the case in involuntary manslaughter, the sale of adulterated food, the sale of intoxicating liquors to minors, habitual drunkards, or insane persons, adultery, incest, statutory rape, and other crimes that might be mentioned. In the case of involuntary manslaughter the accused does not intend to commit the homicide, but does intentionally or negligently commit the wrongful act which results in the homicide. The man who sells adulterated food or intoxicating liquors may not intend to sell the particular kind of food, or to the prescribed class, but he does intend to make the sale. The man who commits adultery may not have knowledge of the married state of his paramour, the man who commits incest may not have knowledge of his relationship to the other party to the crime, and the man who commits statutory rape may not know the age of his victim; but in all such cases the man is a free moral agent, the master of his own destiny, and has it within his power to determine whether the act he is about to commit is or is not a crime, or to refrain from its commission altogether. There is little analogy between such a man and the idiot, the imbecile, or the person who is insane to the degree defined by our statute. It will be conceded that the legislature has a broad discretion in defining and pre-

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scribing punishment for crime, but broad and pervading as the police power is, it is not without constitutional limitations and restraints, and we can scarcely conceive of a valid penal law which would punish a man for the commission of an act which the utmost care and circumspection on his part would not enable him to avoid.

The argument that persons are no longer punished for their crimes is illusory and unsound. In the first place, the defense of insanity is almost invariably interposed in capital cases, where there is no other defense, and the man who is deprived of his life for crime is punished, whatever the engine of destruction may be. The man who is deprived of his liberty is also punished, and you cannot change the fact by changing the name. Liberty regulated by law is the birthright of every citizen, and liberty means freedom from arrest and restraint. It means more than this. It means freedom of action, freedom in the pursuit of any lawful business or calling, freedom in the control and use of one's property, so far as its use does not infringe upon the rights of others, and freedom in the exercise and enjoyment of all the rights, privileges and immunities of citizenship. You cannot convince the prisoner in his cell that he is not undergoing punishment for his crime, and mankind in general will share his doubts. But why should we attempt to uphold the statute on humane grounds, when it is an apparent and palpable attempt on the part of the legislature to punish those whom it fears the tribunal created by the constitution will acquit? All will agree that the unfortunate insane, who are dangerous to themselves or to others, should be restrained of their liberty for their own protection and the protection of society until the danger is removed by death or complete restoration to sanity, but few will contend or agree that they should be punished or restrained beyond this. We are not entirely without authority upon this question.

In 1899 the legislature of North Carolina passed an act which provides that:

"When any person accused of the crime of murder . . . shall have escaped indictment, or shall have been acquitted upon the trial upon the ground of insanity, . . . the court before which such proceedings are had shall in its discretion commit such person to the hospital for the dangerous insane, to be kept in custody therein for treatment and care," etc.

And that: "No person acquitted of a capital felony on the ground of insanity and committed to the hospital for the dangerous insane shall be discharged therefrom unless an act authorizing his discharge be passed by the General Assembly."

This act was declared unconstitutional in *In re Boyett*, 136 N. C. 415, 48 S. E. 789, 103 Am. St. 944, 67 L. R. A. 972. In 1873, the legislature of Michigan passed an act providing that any person acquitted of murder and other high crimes by reason of insanity should be sentenced to confinement in the insane hospital of the state's prison, and that such person could only be discharged therefrom by the governor, upon a certificate of the medical inspector of the insane asylum, and the circuit judge of the circuit from which he was sent, that he is no longer insane. This act was also declared unconstitutional in *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, on the ground that it denied to the accused the protection of the due process clause of the constitution. There would seem to be little difference between a person found guilty of the commission of a crime while insane, and one found not guilty by reason of insanity, for in both cases the two facts co-exist, viz.: violation of the law and insanity. The opinion in the latter case was delivered by Judge Campbell, and concurred in by Judge Cooley and Chief Justice Graves, jurists who were certainly not lacking in humanity or in a knowledge of constitutional restraints on legislative power. In concluding his opinion, Judge Campbell said:

"It is a result of the dangers which have been multiplied by the absurd lengths to which the defense of insanity has

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been allowed to go, under the fanciful theories of incompetent and dogmatic witnesses, who have brought discredit on science, and made the name of experts unsavory in the community. No doubt many criminals have escaped justice by the weight foolishly given by credulous jurors to evidence which their common sense should have disregarded. But the remedy is to be sought by correcting false notions, and not by destroying the safeguards of private liberty."

Like all things earthly, our jury system has its imperfections. Jurors are only human. Their passions and their prejudices follow them into the jury box and not infrequently find expression in their verdicts. The disposition of juries to convict on inadequate testimony in prosecutions for certain crimes has become so notorious that nearly every state legislature has found it necessary to provide that in such cases the prosecuting witness must be corroborated. On the other hand, juries will sometimes acquit when the evidence of guilt seems all but conclusive. This result usually happens where there is no public sentiment behind the prosecution, either because of the nature of the crime charged or the particular circumstances leading up to its commission. But, as well said by Mr. Justice Campbell, the remedy for acquittals through maudlin sentiment or in response to popular clamor must be sought by correcting false notions, and not by destroying the safeguards of private liberty.

There are other objections to the act which would render it unconstitutional in individual cases. It provides what shall or may be done with persons who are insane, idiots, or imbeciles, at the time of their conviction, and the clear implication from this is that such unfortunates shall be placed on trial for their crimes. In that event, what becomes of the constitutional guarantees that the accused shall have the right to appear and defend in person, to be informed of the nature and cause of the accusation against him, to meet the witnesses, etc.? Of what possible avail are these guarantees to a man bereft of reason? But, without pursuing the inquiry further, I am of opinion that the act is unconstitu-

tional, in any aspect we may view it, and I therefore concur in the judgment of reversal.

GOSE and CHADWICK, JJ., concur with RUDKIN, C. J.

DUNBAR, J., concurs on the ground first discussed by RUDKIN, C. J.

MORRIS, J. (concurring).—I am not in accord with the views of my brethren as expressed in the foregoing opinions, in so far as it is sought to be shown that it is not within the power of the legislature to say that insanity shall not be a defense to crime. I can find no such inhibition in the constitution, either expressed or implied. No man, whether sane or insane, has any constitutional right to commit crime, and when the legislature provides that the criminality of an act shall be determined by the act itself, and not by the mental condition of the man who commits it, it violates none of the constitutional rights of the man accused of crime.

In so far as insanity has ever been permitted to determine the noncriminality of an act otherwise criminal, it has been by virtue of the law as given under legislative, and not constitutional, authority. The power to create is the power to destroy, and the same law-enacting body which has said that the insane man cannot be guilty of the commission of a crime may destroy that immunity and determine the character of his act by the same rules as determine the act of the sane man. It is not our purpose to discuss the subject other than in its constitutional aspect. Otherwise we might add—and why not—the defense of insanity is permitted, not because of the inability of the insane man to do the thing complained of, but because of his mental condition there is no moral responsibility, and hence there should be no legal responsibility. It is not the duty of the state to inquire into the moral guilt or innocence of those whom it adjudges guilty of crime, as it derives its power to determine guilt or innocence only as it finds its law violated and its commandments broken by the individual for whose act there is in law

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no justification. No defense has been so much abused, and no feature of the administration of our criminal law has so shocked the law-loving and the law-abiding citizen, as that of insanity, put forward not only as a shield to the poor unfortunate bereft of mind or reason, but more frequently as a cloak to hide the guilty for whose act astute and clever counsel can find neither excuse, justification, nor mitigating circumstances, either in law or in fact. It is, therefore, not strange that there should be found a legislative body seeking to destroy this evil and wipe out this scandal upon the administration of justice. While an innovation to us, such a law is neither unknown nor untried, as it has been the law of England since 1883; and while its constitutionality cannot be questioned, it being an act of Parliament and not subject to such attack, its enforcement must have proved its value and obtained the approval of the English people, or some way would have been found to bring about its repeal. I therefore am of the opinion that the legislature has every right to pass a law which destroys this much-abused defense.

I cannot, however, vote to sustain the law for the reasons given by Rudkin, C. J., in the discussion of the second objection raised. Insanity is a question of fact, and such a fact as can only be determined as other material facts are determined, and not left to the arbitrary announcement of a court unaided by the only means known to our law for the ascertainment of facts in a judicial procedure. The question of insanity should, therefore, be determined by the jury as any other fact; and if in their judgment the person accused committed the act, but was insane at the time of its commission, they should, in my opinion, have legislative authority to so determine. Such a fact, then, having been judicially determined, with the preservation of all the constitutional rights of the accused, authority should be given the court to pronounce such judgment as the legislature in its wisdom may determine. Such is the English law above

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referred to, and such a law would not be subject to the defects shown in the opinion of the chief justice.

For these reasons I concur in the result.

FULLERTON, J. (dissenting).—I am of the opinion that the law is constitutional and that it should be given effect by the courts.

[No. 8531. Department One. September 19, 1910.]

ARTHUR C. MEYERS, *Appellant*, v. IDEAL STEAM LAUNDRY,
Respondent.¹

MASTER AND SERVANT—SAFE APPLIANCES—NEGLIGENCE—EVIDENCE—SUFFICIENCY. A nonsuit is properly granted in an action for personal injuries sustained by an employee in a laundry, caused by throwing his arm into a machine when his foot slipped, where the machine was of standard make, in common use, the dangers were obvious, and no negligence on the part of the defendant was shown.

Appeal from a judgment of the superior court for Spokane county, Canfield, J., entered November 10, 1909, dismissing an action for personal injuries sustained by an employee in a laundry, upon granting a nonsuit. Affirmed.

Danson & Williams, for appellant.

Cannon & Lee, for respondent.

PER CURIAM.—This action was brought by the appellant to recover for personal injuries suffered by him while in the employ of the respondent. He was nonsuited in the court below and brings the case to this court. The respondent conducted a laundry and had therein, as a part of its equipment, a machine for wringing water from washed clothes, called an extractor. The machine in question was of standard make and of a kind in common use in laundries throughout the

¹Reported in 110 Pac. 803.

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country. It contained no hidden defects, nor dangers connected with its operation that were not apparent, nor was the act of operating it especially dangerous; in fact it was testified by the appellant himself that the only danger connected with its operation was the danger of coming in contact with the revolving receptacle. The appellant was injured on this machine. After drying a piece of goods therein, he started to stop the motion of the receptacle in the usual manner by disengaging the gearing and applying the friction brake. In the course of the operation his foot slipped, and in his endeavor to save himself, he threw his arm into the revolving receptacle, receiving the injuries for which he sues.

It has seemed to us that the appellant was properly nonsuited. There was no negligence on the part of the respondent which caused the appellant's injury. The injury was the result of an accident against which only prudence on the part of the appellant himself could guard. To hold the employer liable in such a case is to make him an insurer against all injuries, a liability he does not assume by a mere contract of employment.

The judgment is affirmed.

[No. 8726. Department One. September 19, 1910.]

WM. McKIVOR, *Appellant*, v. GEO. MILTON SAVAGE,
Respondent.¹

APPEAL—REVIEW—HARMLESS ERROR. Error in excluding evidence is immaterial, where it appears from the offer of proof that the evidence would have been insufficient to change the determination of the court.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—ENGINEER'S CERTIFICATES—CONCLUSIVENESS—BAD FAITH—EVIDENCE—SUFFICIENCY. Estimates of a city engineer, who was made the final arbitrator in a contract, are conclusive, in the absence of fraud or mistake; and

¹Reported in 110 Pac. 811.

are not shown to be made in bad faith by evidence that measurements of another engineer tended to show rather more excavation than had been allowed, and that a concrete walk was in places thicker than necessary to secure a uniform thickness of four inches, the city engineer having exercised his best judgment.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—ESTIMATES—CONSTRUCTION. Where a contract requires the yardage of sand and gravel used in street work to be determined by the cubic yards in the pavement as shown by plans and specifications, the proper method of measurement is the cubic yardage of the completed work, and not the separate yardage before the materials are mixed.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered June 26, 1909, dismissing an action on contract upon granting a nonsuit, after a trial before a jury. Affirmed.

Lynch & Grady, for appellant.

Englehart & Rigg (*Bogle & Spooner*, of counsel), for respondent.

FULLERTON, J.—On May 5, 1908, the respondent entered into a contract with the city of North Yakima, by the terms of which he agreed to improve certain streets of that city according to plans and specifications attached to the contract and made a part thereof. The improvement provided for consisted in certain excavating and the laying of a pavement, and for doing this work it was provided that the contractor should be paid so much per cubic yard for the excavation and so much per square yard for the pavement laid, and that "to prevent all disputes and litigation" it was agreed that the city engineer should in all cases determine the amount of work performed under the contract, and that his estimates and decisions thereon should be final and conclusive. The specifications described minutely how the pavement should be constructed. It provided for a concrete base, four inches thick, to be composed of one part of Portland cement, three parts of sharp sand, and six parts of gravel of certain dimensions. On this was to be laid a sand cushion two inches thick, and on

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the sand cushion a layer of vitrified brick, bound together with a filler of Portland cement grout, composed of one part of Portland cement and one part of fine sand.

The respondent sublet a part of the work described in the contract to the appellant. This contract was also reduced to writing, and by its terms the appellant undertook to do all the excavating required by the plans and specifications to the satisfaction of the city engineer, and to furnish and deliver on the streets of the city of Yakima all the sand and gravel necessary to complete the improvement. For the excavating the respondent agreed to pay the appellant a fixed rate per cubic yard for all material removed, the amount thereof to be "determined and decided by the city engineer of North Yakima, Washington, whose decision thereon shall be final and binding on both parties to the contract." For the sand and gravel the respondent agreed to pay "at the rate of one dollar and fifteen cents (\$1.15) per cubic yard, the said amount of yardage to be ascertained and determined by the number of cubic yards actually in the concrete base as shown by the plans and specifications of said local improvement district No. 139, plus the amount of sand used in the sand cushion under the brick, and also the sand on top of the brick, 'payments to be made on or before the 5th day of each month for the preceding month up to 80 per cent of the work done,' said amount due at such times shall be ascertained and determined by the estimate of the said city engineer, whose estimates and determination shall be final and binding on both parties hereto."

The contract between the appellant and respondent was performed on the part of the appellant, and the respondent paid him for the work and for the material furnished by him in accordance with the estimates made by the city engineer. The appellant, however, felt aggrieved at the estimates. He contended that the number of cubic yards of material excavated by him and the number of cubic yards of sand and gravel hauled and delivered greatly exceeded that allowed

him by the estimates of the city engineer, and that the method of estimating the quantity of material in the concrete pavement adopted by the engineer was not in accordance with the contract, and because thereof a less quantity of materials was credited to him than a correct estimate would have allowed to him. The present action was begun to recover at the contract rate for the difference between the number of cubic yards of dirt excavated and of sand and gravel furnished which the engineer allowed in his estimates, and the number the appellant claimed to have actually excavated and furnished.

In the complaint the appellant alleged a material mistake in the contract, incompetence, mistake and fraud on the part of the engineer in making the estimates, and collusion and fraud between the respondent and the engineer practiced for the purpose of depriving him of a just estimate of the work performed by him. At the trial the appellant offered no evidence tending to prove mistake, incompetence or fraud, but evidence was offered tending to show that the grade stakes were changed a number of times during the course of the work and that the actual number of cubic yards removed exceeded the estimate made by the engineer; that the concrete base was made thicker at certain places than the specifications required, and that no allowance was made for the increased thickness; and that an erroneous method of computing the contents of the concrete had been adopted by the engineer, owing to a misconstruction of the terms of the contract. The court, however, refused to admit the proofs offered, and at the conclusion of the hearing, rendered a judgment for the respondent.

The refusal of the court to admit the appellant's proffered evidence tending to show the additional amount of excavation he was compelled to perform, and the additional amount of sand and gravel he was compelled to furnish over and above that allowed him by the engineer in his estimates, constitute the first of the errors assigned. Since one of the

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questions before the court for determination was whether or not the city engineer had made such gross mistakes in judgment in making the estimates as to necessarily imply bad faith, it seems that the trial court might very properly have heard the witnesses offered, so that the comparison could have been made directly between the testimony of the witnesses and the estimates of the engineer; but as it permitted counsel to state in the record what was expected to be proved by the witnesses, any error committed in that respect is so far cured as to permit us to review the general question.

Giving to the statement made by counsel its fullest import, it seems to us it falls far short of successfully impeaching the city engineer's estimates. At most it tended to show that, on a measurement of the work done by another engineer, it was found that rather more excavation had been done than the city engineer's estimates showed, and that in certain places the concrete base and sand cushion were thicker than four inches, a uniform thickness of four inches being one of the dimensions used by the city engineer in making up his estimates. But evidence of this character is not sufficient to overthrow the judgment of an arbitrator selected by the parties to settle disputes between them. Since it is competent for parties to a contract of the nature of the present one to make it a term of the contract that all measurements and estimates of given quantities that must be made during the progress of the work shall be made by a particular individual and that his measurements and estimates shall be final and conclusive on the parties, the judgment of the person so selected, on matters properly within his authority, cannot be impeached by either party without a showing of fraud on his part, or mistake so gross as to imply bad faith, or that he had failed to exercise his honest judgment on the matters submitted to him. The evidence offered fell far short of making a case within this rule. There was no evidence of fraud, nor evidence of such a gross mistake as to imply bad faith, and it is conceded that the engineer exercised his best

judgment. This, as we say, is conclusive of the question, as mere differences between the arbitrator and those called to impeach his judgment are not sufficient to avoid the estimates.

The appellant next contends that the city engineer's measurements were founded upon a misconstruction of the contract, and that the court erred in failing to set aside his awards for that reason. He argues that a fair construction of the terms of the contract would "allow for all materials furnished and put into the concrete;" that is to say, that since the yardage measurement of concrete when mixed is less than the sum of the yardage measurements of the materials of which it is composed, some method of measurement should have been adopted that would have allowed a yardage equal to the yardage of the sand and gravel furnished if measured separately. But we do not think the contract will bear this interpretation. Its language in this particular we have elsewhere quoted, and it is minutely specific as to the manner in which the measurements shall be made to determine the cubic yards of the sand and gravel. In substance it provides that the yardage shall be ascertained by measuring the cubic yards in the concrete base, and adding thereto the number of cubic yards of sand used in the sand cushion and in the so-called filler. It was in this manner the amount was ascertained.

The other errors assigned are so closely connected with those already noticed as to require no separate consideration. The judgment will stand affirmed.

RUDKIN, C. J., GOSE, MORRIS, and PARKER, JJ., concur.

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[No. 8734. Department One. September 19, 1910.]

A. SIMONS, *Respondent*, v. CHARLES CISSNA, *Appellant*.¹

FRAUD—MISREPRESENTATION—SOLVENCY—LIABILITY. General misrepresentations as to the solvency of a corporation not confined to any specific work under a contract, renders the defendant liable to plaintiff for loss thereby sustained in the performance of the contract, including loss on work outside the contract which the parties thereto treated as being within the contract.

SAME—SOLVENCY—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show the insolvency of a corporation, where but \$5,000 of its capital stock was paid in, all of which was used to make an initial payment on a real estate contract, and it had no title or property with which to meet its obligations.

SAME—INSTRUCTIONS. An instruction in an action for misrepresenting the solvency of a corporation, correctly stating the rule of liability, is not prejudicially erroneous by reason of the addition of the clause that a person making such representations cannot be heard to say that he was a person upon whom no reliance should have been placed.

SAME. In an action for misrepresenting the solvency of a company, whether the statement of defendant that plaintiff "could not lose by contracting" with the company was a mere opinion and not actionable, depends upon the context and other representations made at the time respecting the solvency of that company; and it is therefore proper to refuse to instruct that it was a mere opinion or prediction.

SAME—INSOLVENCY—EVIDENCE—ADMISSIBILITY. In an action for misrepresenting the solvency of a mill company, court proceedings begun against the company for the recovery of the land on which the mill was situated, afterwards settled by removal of the mill and surrender of the land, in which action the defendant represented the company, are admissible on the question of the solvency of the company, and defendant's knowledge and connection with its business affairs.

SAME. Evidence that the husband of a stockholder in a corporation owns property is not admissible upon an issue as to the solvency of the stockholder.

EVIDENCE—TRIAL—ADMISSIBILITY. The admissions of a party against interest are admissible as substantive independent evidence on the opponent's case in chief.

¹Reported in 110 Pac. 1011.

SAME—DAMAGES—EVIDENCE—SUFFICIENCY. Where, in an action for misrepresenting the solvency of a corporation, the plaintiff, while unable to segregate all the items of damages resulting therefrom in the performance of a contract, is able to state the entire cost of all the work and what proportion of it was done under the contract, there is sufficient evidence to support a verdict for substantial damages, under an instruction that plaintiff could only recover for loss sustained on work under the contract.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered September 25, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for fraud. Affirmed.

Hadley, Hadley & Abbott and *Hurlbut & Neal*, for appellant.

White & Peringer and *Neterer, Pemberton & Sather*, for respondent.

FULLERTON, J.—This cause was before this court at its January session, 1909, on an appeal from a judgment rendered against Cissna, the present appellant, and his codefendant, the Home Security Savings Bank. The judgment was reversed as to both defendants, and ordered dismissed as to the Home Security Savings Bank, and retried as to the defendant Cissna. The mandate of the court was carried out, and the second trial resulted in a verdict and judgment against the defendant Cissna in the sum of \$7,314.80 and costs. This is an appeal from the last mentioned judgment.

The former opinion of this court is reported in *Simons v. Cissna*, 52 Wash. 115, 100 Pac. 200. In the opinion will be found a full statement of the facts giving rise to the controversy between the parties and the nature of the action. It is sufficient here, therefore, to say that the action is one brought to recover for false and fraudulent representations made by the appellant, Cissna, to the respondent as to the solvency of a corporation known as the American Mill & Timber Com-

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pany, whereby the defendant was induced to enter into a logging contract with that company, which resulted in a loss to him owing to the falsity of the representations.

Taking up the assignments of error in the order in which the appellant presents them, the first to be noticed is the assignment that the court erred in refusing to grant the appellant's motion for a directed verdict, made at the trial after all of the evidence had been given to the jury, but prior to the submission of the case to them. It appeared from the evidence that a portion of the expenditures for which the respondent claimed damages had been made in the construction of skid roads and in logging on lands not owned by the American Mill & Timber Company, with whom the respondent had his contract, but on lands of other owners and on which the respondent was a trespasser. It appeared also that the respondent was not able to state with exactness what sums had been expended in constructing these skid roads and in doing the logging, nor other than in a general way what proportion this work bore to the whole work on which the sum total of his losses were based. It is argued that it could not have been within the contemplation of the parties at the time the representations were made that the respondent would commit a trespass, and hence there can be no recovery for losses suffered thereby; and since there was no segregation of the recoverable portion of the losses from those not recoverable, there can be no recovery at all, other than perhaps a recovery of nominal damages.

But aside from the fact that we think the evidence sufficient to warrant an apportionment by the jury, there is another reason why the objection is not well taken. There was evidence tending to show that the skid roads built on the lands other than those described in the contract were necessary to a successful performance of the contract and were built after a consultation with the mill company, and after the respondent had been assured by the mill company that he had a lawful

right to build them. It was shown, also, that the logging was done on lands on which the mill company claimed the timber, and after the respondent had been directed by the mill company to cut it as being within the contract. In other words, the work was not performed by the respondent as something additional to the original contract, but in the due performance of that contract. Nor were the appellant's representations confined to the mill company's ability to finance a particular undertaking; on the contrary, he represented that the mill company had resources of specific values, and was able to take care of its contracts generally. Since, therefore, the appellant did not confine his representations to the ability of the mill company to pay for the performance of any specific work, and the parties have treated this work as being within the terms of the contract, we think appellant cannot be heard to assert to the contrary; he must be held to have guaranteed ability to perform the contract on the part of the mill company, as the parties themselves should construe it.

A second reason urged in support of this assignment of error is that the evidence fails to show insolvency on the part of the mill company at the time the representations were made by the appellant. But without entering upon an extended review of the evidence, we are of the opinion that insolvency was shown. It will be remembered that but \$5,000 of the capital stock of the mill company was paid in, and that this sum was used in making the initial payment on the property described in the respondent's contract, and which the mill company had contracted to purchase from the Home Security Savings Bank; that by the contract of purchase the mill company acquired no title to the property, but only an agreement on the part of the vendor to convey on certain conditions, to become forfeited at the option of the vendor on the failure of the mill company to comply with the conditions. In fine, after the mill company had paid the initial sum on the purchase price of the property for which it contracted, it had no tangible property whatever, but only a prospective

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interest which it subsequently forfeited. At no time did it have money or property with which it could meet its obligations when they fell due, and this is the test of solvency for an individual or business concern engaged in trade. We think, therefore, that the court did not err in refusing to sustain the challenge to the sufficiency of the evidence.

In its charge to the jury the court instructed them as follows:

"You are further instructed, gentlemen of the jury, that where a person makes representations of the financial standing or condition of another person or company, of such character and under such circumstances as to justify their belief by a reasonably prudent man, such person to whom the representations are made being ignorant of the truth, and acting upon such representations to his injury, he may recover any damages which he may have sustained by reason thereof, although he might have by reasonable diligence have ascertained the solvency of the person or company recommended, and the person making such representations cannot be heard to say he is a person upon whom no reliance can be placed."

The appellant assigns error on the last clause of this instruction, contending that it is inapplicable to any issue in the cause, is misleading, and in its nature highly prejudicial. But while we think the court might well have omitted the clause complained of, we cannot think it reversible error. It is manifest that the court was merely attempting to emphasize and make more clear to the jury what he had previously said in the instruction; namely, that one who fraudulently makes statements that misleads another to his prejudice cannot be heard to say, in defense of his action, that the person misled ought not to have relied on his statements merely because means of discerning their falsity were within his reach. While the thought might have been more happily expressed, it is not erroneously expressed, nor do we think in a manner prejudicial to the appellant. *Simons v. Cissna*, 52 Wash. 115, 119, 120, 100 Pac. 200.

The appellant assigns error on the refusal of the court to give the following instruction:

"You are instructed that the amended complaint in this case charges the defendant, Charles Cissna, with having told the plaintiff 'That he could not lose by contracting with the American Mill & Timber Company'; and you are instructed that under the law such a statement is a mere opinion, prediction or promise of a future condition of things, and is not such a representation as would entitle the plaintiff to rely thereon; and if you find from a preponderance of the evidence that such a representation was made, then you are instructed that such a statement constitutes no basis for recovery by plaintiff in this action, and you must disregard it."

If the sentence here referred to had stood as an independent allegation of the complaint unconnected with anything else, there would be some foundation for the appellant's claim that it was a mere expression of an opinion which the jury should have been warned against treating as an actionable representation. But the sentence was used in connection with other representations made as to the solvency of the mill company as a part of one general statement. The jury were, therefore, entitled to consider the statement as a whole, and it was their province to say whether the statement, when connected with the context, was a representation of solvency or only an expression of an opinion.

The court admitted in evidence, over the objection of the appellant, the complaint, affidavit, and motion for a restraining order in an action begun by one Saling against the American Mill & Timber Company and the Home Security Savings Bank, the action having for its purpose the recovery of the land upon which the sawmill of the mill company was constructed; the action having been discontinued after the removal of the mill from the property claimed. It is urged that these instruments tended to prove no issue in the case, and were, on the other hand, highly prejudicial because of the

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recitals they contained. But we think they were admissible as tending to prove the insolvency of the mill company. There was testimony introduced in connection with the documents tending to show that the action therein mentioned was settled by an agreement between the plaintiff and the mill company, the latter being then represented by the appellant, by which the mill company agreed to remove the mill from the disputed premises; that the mill was so removed and was not thereafter operated by the mill company. This evidence not only tended to prove the insolvency of the mill company, but also the appellant's connection with its business affairs, and hence knowledge on his part of its insolvent condition.

In the course of the examination of the appellant, he was interrogated regarding the financial responsibility of certain of the stockholders of the American Mill & Timber Company, and among other things, stated concerning one Julia Hooker, who owned an unpaid subscription to the stock of that company of \$1,500 that her "husband had 160 acres of timber land just across the line. . . . in British Columbia." This answer was stricken by the court on motion of the respondent, and its action in so doing is assigned as error. But the court did not err in this regard. Evidence that the husband owns property situated in another jurisdiction is not of itself evidence of the solvency of the wife. Whether a person is solvent or not is a question of fact, and when material must be established as a fact. It is not to be inferred from legal presumptions.

The court permitted the witness Sather, over objection, to testify to certain statements made by the appellant concerning the injunction suit before mentioned, while the appellant was testifying in another action. It is urged against this that it could only have been proper in rebuttal, and then only after laying a foundation for impeachment. But counsel have overlooked the fact that the appellant is a party to the present action, and that the admissions of a party against interest constitute substantive independent evidence and are

admissible against him as part of his opponent's case in chief. *Hart v. Pratt*, 19 Wash. 560, 53 Pac. 711.

The court gave to the jury the following instruction:

"I instruct you that in arriving at your verdict, in no event can you charge the defendant with any expense or disbursements that the plaintiff may have incurred in the building of skid roads or bridges upon any lands which are not included in the contract between the Home Security Savings Bank and the American Mill & Timber Company, and that the plaintiff is not entitled to recover for any wages for labor upon any logs or timber upon any land not included in said contract."

As we have stated in discussing another branch of the case, a part of the skid road built by the appellant was built on land not included in the contract between the Home Security Savings Bank and the American Mill & Timber Company, and that the respondent was not able to segregate very closely the proportional cost of constructing the different parts of the road. It appeared also that some 75,000 feet of logs had been cut on land not included in the contract, and that the respondent was unable to separate the cost of cutting these logs from the cost of the entire work. It is the contention of the appellant that the instruction quoted became the law of the case, binding alike upon the parties and on the jury, and because the respondent was unable to segregate the recoverable items from those not recoverable, there could have been no recovery at all, and consequently the verdict is against law.

But while the respondent was unable to segregate the particular items of cost expended in the work done on lands not included in the contract, he did testify to facts from which the segregation could be made by the jury with reasonable accuracy. He testified to the entire cost of the work and to the length of the entire skid road, and what proportion of it was constructed on land not mentioned in the contract; also to the number of feet of logs actually cut, showing that the 75,000 feet cut on land not described in the written contract

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bore but a small proportion to the number actually cut. Conceding the appellant's contention, therefore, that this instruction, although erroneous, is binding as the law of the case, we still think the verdict of the jury supported by the evidence. There was evidence from which the jury could compute the damages with reasonable certainty, and this is sufficient to sustain the verdict.

The case of *Storseth v. Folsom*, 50 Wash. 456, 97 Pac. 492, is cited and relied upon by the appellant in this connection. But that case is distinguishable from the case at bar on the principle that there was there no segregation at all of the recoverable from the nonrecoverable items of damage, and hence, as the court well said, there could be no recovery other than for nominal damages. Here, as we have shown, the facts are different; the recoverable items can be segregated from those nonrecoverable, with reasonable accuracy. Moreover, there were recoverable items of damage shown by the evidence not connected with either of these matters, which alone warranted a substantial recovery. On any theory, therefore, the appellant is not entitled to a reversal on this ground.

The other assignments of error require no separate consideration. There is no substantial error in the record, and the judgment will stand affirmed.

RUDKIN, C. J., CHADWICK, and MORRIS, JJ., concur.

GOSE, J., concurs in the result.

[No. 8344. Department Two. September 20, 1910.]

STEPHEN H. C. MINER, *Plaintiff*, v. ANNA K. PAULSON *et al.*,
Appellants, DANIEL SHULTS, *Respondent*.¹

DEPOSITIONS—RIGHT TO USE—PLEADINGS—AMENDMENTS—WITNESSES—CROSS-EXAMINATION. A deposition taken on behalf of defendant before his answer was amended is admissible in evidence, where the facts alleged in the amended answer are substantially the same; since, under the code, amendments are almost a matter of course at any stage of the proceedings, and cross-examination is not confined strictly to the issues.

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—FRAUD. Parol evidence is admissible to show that a written agreement for the sale of corporate stock did not express the true contract between the parties, where part of the shares were only assigned temporarily for voting purposes, in fraud of the rights of one of the owners, who was not notified and was thereby deprived of their use, although the purchaser intended no ultimate fraud and was willing to reassign the stock.

FRAUD—PLEADING. Fraud need not be alleged in direct terms, it being sufficient if the facts constituting the fraud are set forth.

TRUSTS—DECLARATION OF TRUST. Where the purchaser of corporate stock acknowledged in a letter that part of the stock was to be reassigned to the owners, the letter did not amount to a declaration that the purchaser held the stock in trust for the person to whom the letter was written, where such person only had a half interest therein and desired to defraud his co-owner out of the other half interest.

COMPROMISE AND SETTLEMENT—FRAUDULENT CONCEALMENT. An agreement settling the rights of the parties in and to all the stock of a corporation does not include an interest which one of the parties had fraudulently concealed from the other party to his prejudice without fault or negligence on the part of the latter.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 6, 1909, upon findings adjudging the conflicting claims of defendants to shares of corporate stock, after a trial on the merits before the court without a jury, in an action of interpleader. Affirmed.

¹Reported in 110 Pac. 994.

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Post, Avery & Higgins, Happy & Hindman, and Turner & Geraghty, for appellants.

Voorhees & Voorhees and Graves, Kizer & Graves, for respondent.

FULLERTON, J.—This proceeding was begun by Stephen H. C. Miner, as plaintiff, against the appellants, Paul A. Paulson and Anna K. Paulson, and the respondent, Daniel Shults, as defendants, as an action of interpleader under the code. The plaintiff having in his possession 200,000 shares of the capital stock of the International Coal & Coke Company, and certain moneys paid thereon as dividends, deposited the same with the clerk of the superior court of the county of Spokane, averring in his complaint of interpleader that he disclaimed any interest in the property himself; that the appellant Anna K. Paulson claimed to be the sole owner of the whole thereof; that the respondent, Daniel Shults, claimed to be the owner of a one-half interest therein, and that the appellant Paul A. Paulson claimed some interest the nature of which he was unable to set forth, and praying that the conflicting claims of the several defendants be determined and adjudicated by the court. In answer to the complaint, all of the defendants appeared; the appellants setting up title to the whole of the property in Paul A. Paulson, and the respondent setting up title in one-half thereof in himself. On the issues thus made a trial was had, resulting in a judgment awarding one-half the property to the respondent, Shults. From the judgment entered, this appeal was taken.

The facts giving rise to the controversy are somewhat complicated. The record discloses that sometime in 1902 the defendants acquired certain coal properties situated in the province of Canada, which they deemed of value and which they desired to develop. The title to the property was taken in the name of the respondent, Shults, who thereupon entered into an agreement with the appellant Anna K. Paulson to the effect that he held the same in trust for himself and Anna K.

Paulson jointly, subject to certain limitations and agreements therein set out. Among other things, it was agreed that a corporation should be organized under the laws of the state of Washington, to be known as the International Coal & Coke Company, Limited, with a capital stock of \$3,000,000, divided into 3,000,000 shares of the par value of \$1 each, to which corporation the respondent, Shults, should convey the coal lands before mentioned. The contract also contained provisions for setting apart a certain number of shares as treasury shares, to be under the control of the corporation and sold for development purposes, for the sale of certain others to procure funds to meet certain payments, and that when these payments were made, the remaining shares should be divided equally between Anna K. Paulson and the respondent, Shults. The agreement was executed March 29, 1902, and was carried out in so far as to organize a corporation and convey to it the coal lands, but the parties seem not to have been able to sell any of the corporate stock, at least none of it was sold prior to the month of December, 1902, at which time the parties succeeded in interesting the plaintiff, Miner, in the enterprise.

On the eighth day of that month the parties entered into a written contract with Miner, one Alfred C. Flumerfelt, the agent of Miner, being named therein as principal, whereby Miner undertook, in consideration of the assignment of 1,400,000 shares of the capital stock of the corporation to Flumerfelt, to pay into the treasury of the corporation at certain times and on certain conditions (not necessary to recite here) the sum of \$120,000 to be used in the development of the properties. There was also executed at the same time another writing, in which the parties agreed to deposit with Flumerfelt 700,000 additional shares of the capital stock of the corporation to be held by him in trust for a period of five years, with power to vote the same at all stockholders meetings, the purpose of this being to give to Miner control over the corporation for that period of time. Shortly there-

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after the Paulsons and Shults assigned to Flumerfelt the shares of stock mentioned in the first contract from shares held by themselves in equal amounts; that is to say, the Paulsons furnished one-half of the required number and Shults one-half. The second number were furnished in unequal proportions, the Paulsons putting up the greater part. Thereafter Miner carried out his part of the contract, paying into the corporation the sum of money agreed upon, and thereby becoming entitled to the full legal and equitable title to the shares of stock to which he was to become the owner by virtue of the first mentioned agreement.

The writing evidencing the first mentioned agreement seems not to have correctly recorded the agreement that was actually entered into. At the time Miner decided to make an investment in the coal properties he was at Montreal, Canada, and telegraphed from that place to Paul K. Paulson at Spokane, Washington, requesting Paulson to meet him at the former city for consultation. Paulson met him as requested, and an agreement was concluded between them substantially as recorded in the writing, with the exception that Miner was to receive for his investment 1,200,000 shares of the capital stock of the corporation, instead of 1,400,000 shares as was subsequently stated in the writing. The additional 200,000 shares were added at the request of Paulson.

After the contract had been substantially agreed upon on a basis of 1,200,000 shares, Paulson stated to Miner that he desired that the contract when written be made to include 200,000 shares in addition to the number agreed upon, to be held by Miner until the enterprise should be fairly under way, when he desired them to be reassigned to him. Miner, knowing that one-half the number of shares agreed to be assigned him belonged to the respondent, Shults, whom Paulson represented by power of attorney, demurred to the proposal at first, but finally consented to take an assignment of the stock on condition that Shults be sent for and the contract be executed by him in person. Shults was thereupon telegraphed

for, but before he arrived Miner had left Montreal for some point in the United States, leaving the business in charge of his agent, Flumerfelt. On the arrival of Shults at Montreal he was met by Paulson, who purported to make known to him the terms of the contract, stating the terms with substantial accuracy, with the exception of the number of shares Miner desired assigned to him in consideration of his financing the enterprise, stating that the number of shares to be assigned was 1,400,000, but omitting to state that 200,000 such shares were to be reassigned to him. Shults, believing that the contract as stated by Paulson represented the true agreement, consented thereto, whereupon the terms of the contract were reduced to writing and duly executed.

After the execution of the contract, Miner credited Paulson upon his books with 200,000 shares of the capital stock of the corporation, and in answer to one of Paulson's demands for a reassignment of the stock, wrote him the following letter:

"January 11, 1905.

"Mr. P. A. Paulson—Dear Sir: Your lawyer's letter to me is a thing to make one laugh, and has no effect, as the letter is filled with misstatements from end to end. The facts are these. I have the stock, which Mr. Flumerfelt placed in my hands, intended to be handed over to Mr. Paulson when certain conditions had been complied with. Whether these conditions are all complied with or not, I do not know, as Mr. Flumerfelt has not mentioned the matter to me for many months. One condition I do know is that I was to hand this stock over at my option, for the purpose of control. I had the right to hold said stock in my name, you also pooled a large lot with Mr. Flumerfelt for a term of years for the same purpose. Now then, came severe litigation from other parties, laying claim to your stocks, and in my endeavor to help you, tried very hard to have you settle with all fairly and squarely which you could have done, but you would not hear to anything of the kind, and the consequence is, that you are fleeced of all the stock you had, when you could have saved probably half of it. Now, as this stock was and is, entirely in my hands, and subject to my option, I thought

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best not to promise anything to anybody, until you were clear of what seemed to be many sharp practices. But after the conversation had with you at Grand Forks, on my return at once had placed to the credit of Mrs. Paulson, or Mr. Paulson, the shares in question to be delivered when the pooling arrangement whatever it was with Mr. Flumerfelt ran out, and there they stand since last August. Thinking from what you stated that all possible litigation had ceased. Now, lastly, when your last letter was forwarded, I was in the United States for some time, and on my return was just on the point of writing you these facts when I saw by the Spokane papers that you were having another suit, from another claimant, and thought best to wait until some decision was given in the matter, and as I have not heard, consequently have not written, and being away from home so much, the matter went out of my mind. Now, I simply have this to say, that I shall not trouble myself any more about this whole matter. I have acted so as to protect you in a straight-forward way, but it seems as if you were ever itching for litigation by the way you write me. I should think you had got enough of it by this time. I do not lay claim to this stock today, any more than to have it lay in my hands, and name, until the pooling time expires. Any dividends accruing in the meantime belong to the stock and would be paid over to you, but now as I make this statement definitely, the stock is open to seizure by anyone getting a trumped up claim against you. I am sorry for you, and more sorry for your stupidity.

“Very truly yours,

S. H. C. Miner.”

Some time in the year 1903, one O. G. Labaree brought an action against the Paulsons and Shults in which he claimed 225,000 shares as a commission for negotiating the deal that was made by the Paulsons and Shults with Miner, and later on, the Paulsons brought an action against Shults to recover from him a large number of shares which they claimed belonged to Anna K. Paulson and which Shults was wrongfully withholding. These actions were subsequently settled, the Paulsons and Shults entering into the following agreement:

“This memorandum of agreement, made and entered into this 18th day of July, 1904, by and between Anna K. Paul-

son and P. A. Paulson, parties of the first part, and Daniel Shults, party of the second part, witnesseth,

"That, in consideration of the mutual promises herein, the parties hereto agree as follows: That the second party, out of all the stock owned or claimed by each and both parties hereto in the International Coal & Coke Company, Limited, shall retain and own, free from any claim or right of first parties, two hundred and twenty-five thousand (225,000) shares, and free from the claims hereinafter referred to which are to be paid as herein provided.

"That after one hundred and seventy-five thousand (175,000) shares of stock in said company are paid to O. G. Labaree, in settlement of his suit against the parties hereto out of the certificate of stock for 339,287 shares, being certificate No. 15, standing in the name of second party, and 111,191 shares are paid therefrom to the other claimants who are specified in the answer of second party of the suit between him and first parties now pending, the remaining shares in said certificate shall be divided equally between the parties hereto—that is, one-half of such balance to second party, to constitute a part of said 225,000 shares, and the other half to Anna K. Paulson, being 26,548 shares to each.

"That first parties will assign, set over and transfer to second party 60,952 shares of the stock in said company out of the stock now held in trust for first parties or for said Anna K. Paulson by A. C. Flumerfelt, of Victoria, B. C., to wit: a block of 387,500 which with the said 26,584 shares shall constitute a part of said 225,000 shares.

"That the 187,500 shares of stock held in trust for second party by Alfred C. Flumerfelt under a trust deed dated February 14, 1903, less 50,000 shares already assigned to third persons by second party, shall be retained by second party as a part of said 225,000.

"That this agreement is in compromise, release and settlement of all claims and disputes of every character whatsoever between the parties, and especially in settlement of the suit now pending in the superior court for the county of Spokane, state of Washington, in which first parties are plaintiffs and second party is defendant, which, together with all matters litigated therein, are hereby settled and said suit shall be immediately dismissed, and this paper shall authorize the entry of an order dismissing the same.

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"That the first parties shall have and own, free from any claim by second party, all the stock owned or claimed by each or both parties hereto in said company, except said 225,000 shares, and the various amounts herein provided to be paid to other parties."

At the time this last agreement was executed, Shults was in ignorance of the fact that Miner held 200,000 shares of the corporation stock to which he claimed no title, or that the Paulsons claimed that the stock so held belonged to them; indeed, he did not learn these facts until shortly prior to the time the present action was begun. Miner's purpose in taking the stock is not made very clear by the record, and is perhaps not material, but he seems to have desired it for the increased voting power it would give him while the business of the corporation was in the formative period.

In the briefs of counsel a number of questions have been suggested that we think merit no special consideration. In the main they relate to the admission or exclusion of evidence. We will notice, therefore, only those questions which we deem might have affected the result had a contrary ruling been made.

The deposition of plaintiff Miner was taken at Montreal, Canada, at the instance of the respondent, Shults, after Shults had filed an answer to the complaint. Between the time the deposition was taken and the time of the trial, Shults, by leave of court, amended his answer. At the trial the court allowed the deposition to be read over the objection of the plaintiff. This ruling of the court is assigned as error, but we think the ruling correct. While there is a difference in the phraseology of the two answers, and in the later one the respondent draws a somewhat different conclusion as to the equitable relation of the parties than he drew in the first, the facts alleged are substantially the same in both, and this is the only material inquiry. Moreover, the rule that excludes a deposition taken prior to the amendment of the pleadings, because new issues have been introduced by the amendments,

has not much force under our practice. The reason for the rule as usually stated is that it denies to the party the benefit of cross-examination, since he must necessarily confine his examination to the issues made by the pleadings. But such is not our practice. Here the opposing party may cross-examine on any fact brought out by the examination in chief, whether strictly within the issues or not. The practice has its foundation in our liberal statutes of amendments. A party may amend at any stage of the proceedings almost as of course, to make his pleadings correspond with his proofs, and the rule is just as applicable to a party whose proofs are by deposition as it is to one whose witnesses give evidence orally in open court. The cross-examiner must, therefore, be permitted to cross-examine upon the facts testified to in chief by the witness deposing, regardless of the form of the issues. The deposition offered in evidence shows that counsel fully availed themselves of the privilege in this instance.

It is next insisted that it was not competent to show by the witness Miner that the writing executed between the appellants and respondent on the one part and Flumerfelt on the other did not express the true agreement with reference to the sale of the shares of stock. On this point counsel say:

"We objected that any testimony of Mr. Miner tending to contradict, vary or modify the terms of the written contract was inadmissible, as all statements respecting the contract between the parties prior thereto and all oral understandings were merged in the written contract. We, of course, recognize the fact that written contracts may be upset on account of fraud, accident or mistake. Accident or mistake is not charged, nor is fraud charged against the person who acquired title to the 1,400,000 shares of stock. Under the written contract, Flumerfelt or his principal, Miner, became the absolute and unqualified owner of 1,400,000 shares of stock as soon as they had paid out the moneys named therein. That title and that ownership cannot be changed by one of the vendors who signed this contract (Shults) on the charge of fraud against a co-vendor,

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unless he charges the vendee Miner or Flumerfelt with fraud. Not charging them with fraud, the terms of that written contract, in respect to the title and ownership in the vendee, cannot be varied or contradicted by parol testimony."

But this argument overlooks the fact that the pleading on the part of the respondent, Shults, purports to detail the transactions relating to the sale of the stock as they occurred, Miner's part therein and his motive for so acting, as well as that of the appellant Paulson. It is true that only the acts of the latter are characterized as fraudulent, but enough is alleged concerning Miner's acts to show that he had no right to retain the stock against the claim of Shults, and that while it was not perhaps the purpose of Miner to ultimately deprive Shults of his interest in the stock, his acts were fraudulent in that he had the purpose of wrongfully depriving Shults of their use for a more or less extended period of time. If, therefore, an allegation of fraud against Miner be necessary to admit the proofs objected to, the allegation is found in the pleading, as it is not necessary that a pleading allege fraud in direct terms; it being sufficient if the acts constituting the fraud are set forth. *Andrews v. King County*, 1 Wash. 46, 23 Pac. 409, 22 Am. St. 136; *Rathbone, Sard & Co. v. Frost*, 9 Wash. 162, 37 Pac. 298.

The findings of fact by the trial court we have outlined in our statement of the case. In the main, of course, they are undisputed; the only dispute being over the question whether the contract as written correctly recited the transaction concerning the number of shares of stock that were to be assigned to Miner. It is the appellants' contention that the writing did correctly express this contract. Their story of the transaction is that in all of the negotiations leading up to the execution of the writing, Miner insisted on an assignment to him of 1,400,000 shares of the capital stock of the corporation, to become his property on his performing the conditions recited in the contract; that while the business was under negotiation, the appellant Paul A. Paulson asked

Miner to make him a present of 200,000 shares of the stock in consideration of the hardship and trouble he had been to in locating and securing the claims; that Miner at that time would not consent to the proposition, "turned him down" as the witness expressed it; but after the contract was executed the subject was broached to him again, when he made a promise to assign the shares to Paulson. But without entering into a detailed analysis of the evidence opposing this contention, we think it abundantly justifies the conclusion of the trial judge. We think the evidence clear that the contract with Miner was made on a basis of 1,200,000 shares of stock, instead of 1,400,000 as the writing expresses it, and that the extra 200,000 shares was inserted in the writing at the request of Paul A. Paulson with the intent on his part to defraud Shults out of his interest in one-half thereof; that Miner knew of Shults' interest, but accepted the shares, nevertheless, because of the additional voting power in the corporation the shares would give him during the formative period of its business, intending finally to return them to the true owners.

But the appellant contends in this connection that the letter from Miner to Paul A. Paulson we have heretofore quoted constituted a declaration of trust entitling Paulson to recover the stock, notwithstanding there may have been no consideration for the declaration. But this contention is evidently founded on the claim that Miner acquired title absolute to the whole 1,400,000 shares described in the writing, and could make such disposition of them as he saw fit; but it is manifest that the contention is not tenable under the view of the facts found by the court and adopted by us here. One hundred thousand of the shares, under our view of the case, was never Miner's property to give away, and he could make no such binding promise concerning them as would deprive the true owner of his interests.

Again, it is contended that the title to the shares in dispute became the property of the appellants by the settlement

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agreement of July 18, 1904, heretofore set out. The claim has its foundation in the last clause of the agreement. An examination of this clause will show that it is sufficiently broad to vest title in the appellants to the shares in question had there been no concealment of the facts from Shults by the appellants. But we think this act on their part prevents them from enforcing the contract. Shults, it will be remembered, had no knowledge at the time this agreement was entered into that he had any interest in the shares of stock now in question. He thought then that these shares belonged to Miner. The reason he did not know differently was because of the conduct and representations of the appellants. They had deceived him into the belief that the only remaining shares of stock of which they had ownership were the shares specifically described in the contract of settlement. To allow them now to assert to the contrary would be to allow them to take advantage of their own wrong, a thing not tolerated in a court of equity, especially where the effect of the wrong is to deprive another of his property.

There are cases, it is true, which hold that it is competent for a party by his own act to forego a recovery for unknown as well as known causes of action, but these are cases where the ignorance of the party held to be estopped was the result of his own fault or carelessness. We have found no case which holds the party estopped who has been induced to enter into a waiver of an unknown cause of action by the fraud and concealment of the other party to the contract of waiver. The question here falls within the latter class, and we think both equity and good conscience require that the injured party be not held estopped.

But it is urged that the appellants Paulson did not receive in the contract of settlement as many of the shares of stock as they were entitled to receive, if they are not permitted to retain the 100,000 shares in question here, and should now be permitted to litigate that question. But we are unable to find anything in the record that substantiates the fact here

assumed. No evidence was introduced or offered to that effect; on the contrary, it would appear from evidence concerning the settlement that the claim was not even considered an asset by the appellants. Even their counsel, who had in charge the settlement and knew all the facts, says that he "did not regard it as a legal claim or demand at that time; it was invisible." If this be true, it is difficult to understand why the appellants should surrender anything to the respondent in lieu of respondent's rights therein. But the record being silent as to any such controversy, the court would not order a rehearing in any event. The courts deal with real, not supposed, wrongs. A party will not be put to the burden of a trial until it is shown that there is an actual controversy.

The judgment appealed from will stand affirmed.

RUDKIN, C. J., GOSE, MORRIS, and CHADWICK, JJ., concur.

[No. 8642. Department One. September 20, 1910.]

ELMER E. HULL *et al.*, *Respondents*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.¹

EVIDENCE—PAROL EVIDENCE—COLLATERAL ISSUE. That the plaintiffs in an action were the joint owners of an automobile, by reason of a conditional contract of sale in writing, is a collateral issue only, which may be proved by parol.

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS. Error cannot be predicated on the exclusion of a writing which might have shown the value of an article in issue, where its production was not asked for that purpose.

EVIDENCE—WRITING—DEMAND TO PRODUCE. A demand to produce a writing, made of a witness on the stand, is not such as to put the parties to the action in default for failure to produce it.

EVIDENCE—PAROL EVIDENCE—BOOK ACCOUNTS. Parol evidence is admissible of the amounts received for the sale of chattels, although the amounts received were recorded in regular books of account.

¹Reported in 110 Pac. 804.

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TRIAL—MOTIONS—ARGUMENT OF COUNSEL—DISCRETION. It is discretionary for the trial court to refuse counsel the privilege of arguing on his motion for a nonsuit.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE. In an action for the destruction of an automobile at a railroad crossing, the plaintiff is entitled, on the question of his contributory negligence, to have his conduct judged by the circumstances surrounding him at the time, and compared to that of a reasonably prudent man.

DAMAGES—INSTRUCTIONS—MAXIMUM. In an action for damages, it is not error to give an instruction stating the maximum amount to which the plaintiffs would be entitled under the pleadings.

RAILROADS — CROSSINGS — DUTY TO STOP, LOOK AND LISTEN. The driver of an automobile, whose machine became stalled on a railroad crossing, owed no absolute duty to stop, look, and listen before driving on the track, if he could ascertain that he could cross in safety by looking and listening.

SAME—NEGLIGENCE—QUESTION FOR JURY. The negligence of a railroad company is for the jury, where it appears that its electric motor and train ran down an automobile, stalled on a crossing, that the machine could have been seen for a distance of over 400 feet, and the train stopped within 160 feet, but the motorman was not at the motor and did not get there until within 60 feet of the crossing.

SAME—CONTRIBUTORY NEGLIGENCE—AUTOMOBILES. The contributory negligence of the driver of an automobile, stalled on a railroad crossing by its engine going dead, is for the jury, where he testified that he was unable to stop the automobile before reaching the track, and expected its momentum would carry it across, and the men in the car, who failed to push the car off, immediately started to flag the train and were not subject to his control.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 19, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages. Affirmed.

Morris B. Sachs, for appellant.

J. L. Waller, Ralph Simon, and Thos. R. MacMahon, for respondents.

FULLERTON, J.—The respondents brought this action against the appellant to recover the value of an automobile which was run into and destroyed by a train operated on the

appellant's railway. At the time of the accident, the automobile was being driven by a son of the respondent Hull, who had engaged to carry a pleasure party, seven in number, from Georgetown, in King county, to a place on Lake Washington. The road over which the party traveled parallels the appellant's railway for a considerable distance, finally crossing it at a place known as Rainier Beach. The car approached the crossing running at the rate of about eight miles per hour, and reached a point some twenty feet therefrom when its engine suddenly stopped, "went dead", as the driver expressed it. The driver sought to revive the engine by manipulating certain of its controls, and in the meantime the car ran forward onto the track by reason of its own momentum, stopping with the rear wheels between the rails of the railway track. Just then a train was heard approaching along the appellant's railway, and three of the passengers, who had hastily alighted from the car, ran along the track towards the approaching train, and by shouting and making gestures sought to call the attention of the persons in charge of the train to the position of the automobile. They testify, however, that the train continued its approach without an appreciable diminution in its speed, crashed into the automobile, and threw it from the track against a telephone or trolley pole of the appellant company with such force as to break down the pole and totally demolish the automobile. On the trial the jury rendered a verdict in favor of the respondents, and from the judgment entered thereon, this appeal is taken.

In the complaint the respondents alleged that the Winton Motor Carriage Company had sold the automobile in question to the respondent Hull on a conditional contract of sale, reserving title in itself, and that there was still due on the contract from Hull to the company some \$1,100. This allegation was denied by the appellant on information and belief. At the trial the respondent Hull while on the stand was questioned concerning the contract, and answered to the

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effect that there was such a contract existing between himself and his coplaintiff. He was then asked the amount due on the contract, and over the objection of the appellant, was allowed to answer. Later on, an agent of the motor company was placed on the stand and testified as a witness for the plaintiffs. On cross-examination he was asked concerning this contract, and stated its effect substantially as alleged in the complaint, stating further, in answer to a direct question, that the contract was in writing. He was thereupon asked to produce the contract, when objection was made by counsel for the plaintiff, and the objection sustained by the court. These rulings constitute the errors first assigned. The assignments, we think, are not well taken. The purpose of the allegation in the complaint was to show the relation of the plaintiffs to each other and their right to join as parties plaintiff in bringing the action. Its denial by the appellant raised but a collateral issue only, which could be proved without the production of the written contract. *State v. McKinnon*, 99 Me. 166, 58 Atl. 1028; *Garrison v. Glass*, 139 Ala. 512, 36 South. 725; *Elgin J. & E. R. Co. v. Thomas*, 215 Ill. 158, 74 N. E. 109; 25 Am. & Eng. Ency. Law (2d ed.), 173. There was, therefore, no error in permitting the respondents to show by parol that they had a joint interest in the property even though a written contract existed between them.

The appellant argues further, however, that it was entitled to have the written contract exhibited, since it might have shown the contract price of the machine, which would have been some evidence of its value. Had it been shown that the writing recited the contract price of the machine, and had the appellant requested its production in order to present it as a part of its own case, it might have been error for the court to have refused to require its production, but it was not error under the circumstances shown here. The demand to produce the writing was not made on the parties, but of a witness under cross-examination. This was not such

a demand as to put the parties in default even were the right to the document undoubted.

In the course of the trial a witness was placed on the stand and questioned concerning the disposition made of the automobile after the accident, and answered to the effect that it was disposed of as junk. He was then asked to state the sum received for it. At this point the appellant interrupted the examination and requested permission to ask a question for the purpose of ascertaining the competency of the evidence. Permission was granted it, whereupon it elicited from the witness the fact that the junk had been sold in parts to different persons and that regular books of account had been kept showing such sales and the sums received therefor. The appellant thereupon objected to the witness' testifying to the amount of the sales, contending that the entries in the account books were the best evidence. The objection was overruled, and error is assigned thereon. But manifestly the ruling is without error. A person having knowledge of the sale of a chattel and the amount paid or agreed to be paid for it is a competent witness to the fact, although he may have recorded in his books of account a memorandum of the sale. Indeed, books of account have themselves always been regarded as a species of secondary evidence, admissible in favor of the party keeping them, because of the necessities of the case; not because they were the best evidence of the transactions recorded in them. Greenleaf, Evidence (14th ed.), § 117. The fact that such entries have been made has never been held to preclude the testimony of the person having knowledge of the facts and able to testify to them from memory.

It is next assigned that the court erred in denying to the appellant's counsel the privilege of arguing his motion for a nonsuit. But the court was not obligated to listen to counsel's reasons for his motion. If the court felt satisfied that the case made was one that must be submitted to the jury

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in any event, it could, without error, announce this fact to counsel and refuse to hear arguments upon the question.

The court instructed the jury in part as follows:

"If you should find from the evidence that the driver of the automobile might have avoided the accident by adopting some course of action other than that pursued by him, he would not necessarily be guilty of contributory negligence in that respect, provided you find that the driver of the automobile acted as an ordinarily careful and prudent person would have acted under like circumstances and conditions, and you further find that an ordinarily prudent man under the particular circumstances surrounding the said driver at the time, would have been justified in adopting the course pursued by the driver of the automobile. The driver's conduct in that regard is not necessarily to be judged by the facts as they now appear before you, but the plaintiff is entitled to have the acts and conduct of the said driver considered in the light of the facts as they appeared to him at the time, and if you find that an ordinarily careful and prudent man would have acted as said driver acted with his, the driver's view of all the circumstances and conditions as they were at that time, you will be justified in finding that he was not guilty of contributory negligence.

"If you find for the plaintiffs you cannot award them a greater amount than they have asked for in their second amended complaint, that is—I believe, gentlemen, you have asked for \$2,500, and the estimated value of the junk was \$200—that would be \$2,300—you could not find for any greater sum than \$2,300."

The first of these follows substantially an instruction approved by this court in *Traver v. Spokane Street R. Co.*, 25 Wash. 225, 65 Pac. 284, and is a correct statement of the law. After an accident happens it is always easy to see many ways by which it could have been avoided, but such considerations do not usually afford a correct test of negligence. A victim of an accident is entitled to have his conduct judged by the circumstances surrounding him at the time of the accident—by the conditions as they appeared to one in his then situation—and if his conduct when so judged

appears to be that of a reasonably prudent person, he cannot be said to be guilty of negligence. The instruction of the court did no more than announce this rule.

The second instruction was nothing more than a statement to the jury of the maximum amount of damages they would be entitled to find in case they found for the plaintiffs. It was without error.

The appellant requested the court to give the following instruction which was refused:

"The jury are instructed that if they find that the servants, agents or employes of the plaintiffs in charge of said automobile, by any act or omission on their part were guilty of negligence, and that such negligence directly contributed in causing the collision and injuries, if any, then you will find for the defendant regardless of whether or not it or its servants were also negligent. And in this connection you are instructed that it is the duty of the chauffeur who was in charge of the said automobile, if you find from the evidence that he was in charge thereof, and who was acting as the agent of the plaintiffs in running said automobile, if you find from the evidence that he was so acting, upon approaching said crossing, to have stopped, looked and listened before place in question, and if you find from the evidence that the chauffeur did not stop, look and listen upon approaching said tracks, and that his failure to so stop, look and listen was the proximate cause of the accident, such failure would be negligence of the plaintiffs, and plaintiffs cannot recover herein, and your verdict must be for the defendant."

This instruction was properly refused as not correctly stating the law applicable to the facts of the case. The respondents' driver owed no absolute duty to stop before attempting to cross the appellant's track. If on approaching the track he could ascertain by looking and listening that he could cross in safety, he has complied with the rule. Here the driver testified that he traveled parallel to the appellant's track for six miles without meeting or being passed by a single car, that on arriving at the track he looked in both directions and listened and neither saw nor heard a

train approaching, and that the time it would take an approaching train to travel over the distances he could see the track gave him plenty of time to cross if no mishap befell his car. The sequel, also, proves his statement to be true. It will be remembered that the car stopped with the rear wheels between the rails, and that the passengers had time to alight after the stopping of the car and proceed along the track towards the approaching train a considerable distance before the train reached the place of crossing. Under these circumstances it would have been error for the court to have charged the jury that the respondent was guilty of negligence as a matter of law if he did not stop before attempting to cross the track.

The material part of the other instruction requested was included in the general charge given by the court on its own motion. This satisfies the rule.

The remaining assignments question the sufficiency of the evidence to sustain the verdict. But without following the argument of the appellant's counsel, we think the evidence justified the court in submitting the case to the jury. On the question of the appellant's negligence, the evidence most favorable to the respondent—and it is this evidence we must accept as true—tended to show that the track in the direction from which the train approached the automobile was practically straight for a distance of from four hundred to four hundred and fifty feet, and that the automobile while on the track was plainly visible from the train for this entire distance; that the train consisted of an electric motor and a flat car, the latter being loaded with steel rails, and was in charge of a motorman and a brakeman; that when first seen it was not running at an excessive speed, and could have been stopped, as the motorman himself says, within a distance of from one hundred and sixty to one hundred and seventy feet; that when the car became stranded and the passengers sought to attract the attention of the motorman to its position, the motorman was not at the motor, and did not reach

it until the train had approached to within some sixty feet of the automobile, too late to materially check its speed before it crashed into the car. On these facts, it was clearly for the jury to say whether there was negligence on the part of the appellant's servants.

On the question of contributory negligence, it is insisted that the respondents' servant was negligent when he failed to stop his machine before reaching the track after he discovered that the engine had stopped running, and, also, that he was negligent in that he did not call the passengers to his assistance and push the car from the track out of the way of danger. But with reference to the first objection, the driver stated that the distance between the point the engine stopped and the track was too short within which to stop the car, and furthermore, he thought if the engine did not start from the efforts he made to start it by manipulating its controls that the car would roll clear of the track by reason of its own momentum. As to the second objection, he stated that the men of the party all started forward to warn the approaching train of the position of the automobile as soon as the car stopped, and that in any event their conduct was not subject to his control. Under these circumstances it seems clear that the question of negligence was one of fact for the jury, rather than one of law for the court, and this being so, we must abide by their verdict.

The judgment is affirmed.

RUDKIN, C. J., GOSE, and MORRIS, JJ., concur.

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[No. 8662. Department One. September 20, 1910.]

TENA BUTLER, *Respondent*, v. SUPREME COURT OF THE
INDEPENDENT ORDER OF FORRESTERS, *Appellant*.¹

APPEAL—DECISION—LAW OF CASE. Upon a second appeal, the decision on the former appeal becomes the law of the case.

INSURANCE—ACTIONS—PROOF OF DEATH—QUESTION FOR JURY. Whether the insured, whose absence was unexplained for many years, met his death shortly after leaving home and while the policy was still in force, is for the jury, where it appears that he was industrious and of good habits and left a wife and young children, with whom he was living pleasantly, saying that he was going on a short trip to mines, in which he was interested, and which were in a wild mountainous county, and was never again heard from, although diligent search was made for him at the time of his disappearance.

INSURANCE—POLICY—FORFEITURE—PROHIBITED EMPLOYMENTS. A life insurance policy containing a prohibition against engaging in mining or prospecting is not forfeited by a visit to mines in which the insured was interested.

TRIAL—SPECIAL VERDICT—DISCRETION. It is discretionary with the trial court to require a special verdict.

INSURANCE—ACTIONS—PROOF OF DEATH—EVIDENCE—ADMISSIBILITY. Upon the sudden disappearance of an insured, whose absence was never accounted for, it is permissible to show his general character by evidence of his previous conduct.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 9, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on a benefit insurance certificate. Affirmed.

Samuel R. Stern, for appellant.

Belden & Losey, for respondent.

FULLERTON, J.—This is an action upon a benefit insurance certificate issued by the appellant, a fraternal institution, insuring the life of one August Schneider. The cause has been before this court on two prior occasions: the first, on an ap-

¹Reported in 110 Pac. 1007.

peal from a judgment dismissing the action for want of jurisdiction in the court to entertain it (48 Wash. 147, 98 Pac. 66); and the second, on an appeal from a judgment dismissing the action at the conclusion of the plaintiff's case in chief, on the ground that the evidence was insufficient to justify a verdict (53 Wash. 118, 101 Pac. 481). After the cause had been remanded from this court after the second hearing, it was tried upon its merits, and a verdict and judgment for the plaintiff entered therein. This appeal is from the last mentioned judgment.

The facts which give rise to the controversy are fully stated in the opinion reported in 53 Wash. 118, 101 Pac. 481, and it is unnecessary to restate them again in detail here. Suffice it to say, therefore, that the insured left his home in the city of Spokane on July 7, 1898, stating to his sister-in-law just before leaving that he was going to the mines to be gone for a short time, requesting her at the same time to take care of the house and water the lawn during his absence, and say to his wife, who was then visiting away from home, that he would return on the following Wednesday, the day he left being Friday; that he failed to return, and has not since that time been seen.

Many of the questions discussed in the appellant's brief were determined by this court on the last appeal contrary to his contentions, and are necessarily concluded against him. His attorney, however, argues with great force that it was necessary for the plaintiff to prove that the insured died while he was in good standing in the order in which he was insured; namely, before February 28, 1900, the date to which his dues were paid, and that there was no evidence at all introduced tending to prove the fact. But without attempting to follow the argument of counsel, we think there was evidence from which the jury were warranted in finding the fact. The insured left his home abruptly, and somewhat hurriedly, without preparation for an extended stay, saying that he was going to the mines, from which he expected to

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return within a short time. It was shown that he was sober and industrious, that his home relations were most agreeable; that he was the father of two young children of whom he was very fond; and that he took pride in caring for his home and making its surroundings pleasant. It was shown, furthermore, that search was made for him almost immediately, that his disappearance was made known to his lodge brethren, who followed up every clue that was given them, but that no one was able to learn of his whereabouts. It was shown, furthermore, that he was interested with another in certain mining prospects, and had previously expressed to his wife his intention of visiting them. When we add to this the fact that no trace of the insured has ever been found, and that a person is subjected to more or less peril when traveling in the wilds of the mountains, it is some evidence, we think, that the insured met his death shortly after he left his home on July 7, 1898. A man of his character does not ordinarily abandon his home and his wife and young children, with whom he lives pleasantly, without cause, and it is more reasonable to suppose that the insured was prevented from returning by death than that his stay was voluntary. It must be remembered that the question was one for the jury to determine, and their conclusion, if supported by reasonable inferences, must be sustained by the courts.

The remaining questions require no especial consideration. The inference to be drawn from the insured's statements is rather that he intended to visit his mines than to engage in prospecting or mining. If his purpose was the former instead of the latter, there was no forfeiture of the policy. To visit a mine does not work a forfeiture under a policy of insurance containing a prohibition against engaging in prospecting or mining.

Three special interrogatories were submitted to the jury, and answered as follows:

"(1) Did August Schneider die between July 6, 1898 and April 1, 1900? Answer. Yes. (2) If you answer the

above in the affirmative, then tell when within that period he died. Answer. Before April 1, 1900. (3) Did August Schneider engage in the business of mining after his disappearance and before April 1, 1900? Answer. No."

On the return of the verdict the defendant requested that the court instruct the jury to make the second answer specific by stating the date on which he died. This the court declined to do. We do not, however, find error in this ruling. Aside from the fact that it was not a material inquiry, the question whether a special verdict will be required is so far discretionary that an appellate court will review only for a gross abuse. There was no such abuse in this instance.

The question asked the witness Hamilton concerning the conduct of the insured while a soldier was admissible as tending to show his general character. The remaining assignment, whether sufficient inquiry was made by the relatives and friends of the insured to ascertain his whereabouts, was for the jury. What was done in that behalf was before them, and it was for them to say whether a more extended inquiry should have been made.

The judgment will stand affirmed.

RUDKIN, C. J., and GOSE, J., concur.

MORRIS, J. (concurring)—I concur upon the authority of the previous decision as establishing the law of the case.

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[No. 8834. Department One. September 20, 1910.]

N. FRED ESSIG *et al.*, *Respondents*, v. C. S. TURNER *et al.*,
Appellants.¹

INDEMNITY—FOR BAIL—CONTRACTS—VALIDITY—WHAT LAW GOVERNS. A bond to indemnify bail furnished by a person convicted in a Federal court is not governed by Federal laws merely because the United States might have refused to accept bailors who had agreed to take indemnity, where the bailors were accepted by the United States and the bond was executed within, and between citizens of, this state.

INDEMNITY—FOR BAIL—CONTRACTS—VALIDITY—PUBLIC POLICY. Under the statutes of this state, authorizing a prisoner to deposit money in lieu of bail, a bond to indemnify sureties on a bail bond is not void as against public policy in that it removes the inducement for vigilance; especially where the indemnifying bond increased the number of persons interested in securing the presence of the prisoner.

SAME—CONSIDERATION FOR INDEMNITY FOR BAIL. A bond to indemnify the sureties on a bail bond is not void for want of consideration because executed after the giving of the bail, the recital showing that it was given to induce the continuance of the bail.

SAME—BONDS—EXECUTION—EVIDENCE—SUFFICIENCY. The execution of an indemnity bond is sufficiently shown, although the sureties insisted that they only signed a blank sheet of paper which was subsequently attached to the writing, where the bond, typewritten, itself shows that it could not have been executed in that way, the signatures appearing in regular order over lines regularly spaced therefor.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 4, 1909, upon findings in favor of the plaintiffs, in an action on an indemnity bond, after a trial on the merits before the court without a jury. Affirmed.

H. N. Martin and *Poindexter & Moore* (O. C. Moore, of counsel), for appellants.

Graves, Kizer & Graves, for respondents.

FULLERTON, J.—Charles C. May was convicted of a felony in the district court of the United States for the district of

¹Reported in 110 Pac. 998.

Washington, and sued out a writ of error to the circuit court of appeals for the ninth circuit, from the judgment pronounced thereon. Pending a hearing on the writ, he entered into a recognizance in the sum of \$5,000 to the United States of America, with the respondents as sureties, conditioned for his appearance in the district court at any time his appearance should be required after the determination of the writ of error. The recognizance was dated April 2, 1906. On April 16 following, the appellants executed and delivered to the respondents a written obligation in the form of a bond, binding themselves to refund to the respondents any sum they should be compelled to pay to the United States in case of a forfeiture of the recognizance entered into by themselves and May. May thereafter forfeited the recognizance, and the respondents were compelled to pay to the United States the full penalty thereof; namely, \$5,000. They thereupon brought the present action against the appellants on the indemnity bond. They recovered in the court below, and this appeal was taken from the judgment entered therein.

The first contention made by the appellants is that the obligation sued upon is void as against public policy. In support of this it is argued that the question is one of Federal cognizance in which the rule of decision applied by the Federal courts to like contracts must be held to be controlling, and that under such rule the contract is void. This argument has its basis in the fact that the obligation was given to indemnify bail furnished to a person convicted in a Federal court, but it does not seem to us that this makes it a contract subject to Federal cognizance. It is true that the Federal court might have found the fact that the bailors had taken or agreed to take indemnity, a sufficient reason for refusing to accept them as bail, under the authority of *United States v. Simmons*, 47 Fed. 575. But since it did accept them as bail notwithstanding the fact, and did enforce against them the full penalty of their obligation, we think that court has exhausted its remedies and can have no further concern

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with the acts of the bailors, or power to prevent them from recouping themselves for the loss they sustained out of property belonging to their principal, or out of the securities he furnished them for that purpose. Furthermore, the contract was executed within the state of Washington between citizens of that state, and is otherwise wholly local in character. Its only connection with the bail bond in the United States court is the fact that the execution of that bond and the remaining thereon by the respondents furnished the consideration for the execution of the obligation. It seems to us, therefore, that its validity must be determined by the laws of the state applicable to such contracts.

Considering the matter as one of state policy solely, there can be no question as to the validity of the obligation. As we have said, the invalidity of the obligation is urged on the ground of public policy, the argument being that since it is the purpose of bail to secure the appearance of the prisoner, that purpose is better subserved by unindemnified bail than when the bail is indemnified, as the former have a direct pecuniary interest in securing the appearance of the prisoner, while to the latter it is a matter of indifference whether he appears or not. But this argument can have no weight in this state. Here bail is regulated by statute, and the statute provides that the prisoner himself may, in lieu of personal sureties, deposit money in a sum equal to the amount fixed for his appearance. Plainly, therefore, it is the forfeiture of the sums fixed in the order of bail that the state relies upon to secure the presence of the prisoner, not the personal vigilance of sureties; and this being so, it cannot be contrary to the public policy of the state for the prisoner to indemnify his bail.

This precise question, under a similar statute, was before the court of appeals of New York in *Moloney v. Nelson*, 158 N. Y. 351, 53 N. E. 31, speaking to which the court said:

"It is true that in some other jurisdictions, as is pointed out in the very careful opinion of the appellate division, it has been suggested, if not decided, that it is against public policy to allow bail to become indemnified, the reason given being that the object for which the bail is required is to assure the appearance of the prisoner to answer the charge against him, and that necessarily the bail had a direct pecuniary interest in preventing the escape of the prisoner, which he would not have were he fully indemnified. That is not the public policy of this state; for the giving of bail in criminal cases is regulated by statute, and the legislature has, by its provisions, provided that a personally responsible surety may be altogether omitted if the accused prefers to make a deposit of money; he may have his choice either to give a bond with sureties, or make a deposit of money. It is the loss of the money deposited, or the assurance that the sureties will be obliged to pay the amount of the bail, that is relied upon to secure the presence of the accused. It, therefore, cannot be said to be a part of the public policy of this state to insist upon personal liability of sureties, for there need not be such personal liability in any case if the accused make a deposit of money in lieu of bail, as provided by the statute."

In West Virginia, in the absence of such a statute, a similar ruling was made. *Carr v. Davis*, 64 W. Va. 522, 68 S. E. 326. So, in the following cases, the question seems to have been necessarily decided to the same effect, although the courts did not discuss it directly. *Simpson v. Robert*, 35 Ga. 180; *Holker v. Hennessey*, 143 Mo. 80, 44 S. W. 794, 65 Am. St. 642; *People v. Skidmore*, 17 Cal. 261; *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162.

It would seem, moreover, that the validity of the present obligation can be upheld on another principle. The indemnity here was not furnished by the prisoner himself. It was furnished by the prisoner's friends who pledged their own estate to answer for his presence. The reason for the rule against indemnifying sureties therefore fails in this case, as it cannot be supposed that these seven persons who executed the indemnity bond would be less vigilant in their

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efforts to secure the appearance of the principal than would the two who were on the original undertaking. The persons financially interested in securing the presence of the prisoner was increased, rather than decreased, by this transaction, and the reason for the rule failing, the rule itself must fail. 16 Am. & Eng. Ency. Law (2d ed.), p. 172. We hold, therefore, that the obligation sued upon is not void as against public policy.

The appellants next insist that the obligation in suit is void for want of consideration. This contention is founded on the fact that it was executed some two weeks later than the original bond, the argument being that for the one obligation to constitute a consideration for the other they must have been executed contemporaneously. But while it is true that ordinarily a past consideration will not support a present promise, this obligation is not of that sort. Here, by the recital of the obligation itself, it is shown that it was executed as much to induce the bailors to continue as bail for their principal as it was to induce its original execution. Since the bailors had the right to surrender the principal at any time and relieve themselves of their obligation, the indemnity bond had a present consideration as well as a past consideration, the former being of sufficient import to support its validity.

On the question of fact presented, we feel inclined also to follow the findings of the trial judge. While the appellants, or some of them at least, testify to facts which if given credence would relieve them from their apparent obligation, the physical facts shown here so clearly refute their statements that we are compelled to believe that they must have confounded this with some other transaction. Their story in brief is that this obligation was never presented to them for execution at all; that they, at May's request, placed their names on a blank sheet of paper as evidence that they would go his bail if later called upon for that purpose, and that this paper was subsequently attached to the writing-

making the purported obligation. But the bond itself bears on its face conclusive evidence that it could not have been executed in that way. The bond is formal in its character, having been prepared by an attorney, the signature of the obligors follow one another in regular order, are evenly spaced, and are written on and over lines placed on the paper by the use of a typewriter. While many more evidences of the genuineness of the instrument might be cited, these are enough to show that it could hardly have been framed in the manner in which the witnesses testified.

The judgment is affirmed.

RUDKIN, C. J., GOSE, MORRIS, and CHADWICK, JJ., concur.

[No. 8749. *En Banc*. September 20, 1910.]

AMERICAN SAVINGS BANK & TRUST COMPANY, *Respondent*,
v. Z. A. MAFRIDGE, *Appellant*.¹

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—CONTRACTS—CONSTRUCTION. A written contract whereby a party desiring to purchase a lease agreed to pay for the use of the premises, to the assignee of the lease, monthly during its term, a fixed sum in addition to the monthly rent which the original assignee is obliged to pay to the lessor, is in law an assignment of the lease.

FRAUDS, STATUTE OF—ASSIGNMENT OF LEASE—ACKNOWLEDGMENT. An assignment of a lease is valid without acknowledgment under the laws of this state.

LANDLORD AND TENANT—LEASE—CONTRACTS—MUTUALITY. A contract whereby a party agrees to pay the assignee of a lease, for the use of the leased premises, a fixed sum monthly during the term of the lease in addition to the rent, signed by both parties, is on its face a mutual contract and enforceable.

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—CONTRACTS—BREACH—ACCEPTANCE OF RENT. Where the plaintiff, being assignee of a lease, sold the same to defendant, and defendant's corporation in possession afterwards went into the hands of a receiver, acceptance of the rent for two months from the receiver, and receipt of

¹Reported in 110 Pac. 1015.

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the key, will not prevent the plaintiff from recovering from the defendant the balance due on the contract, where the evidence shows he did not intend to release the defendant.

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—BREACH—DAMAGES. The assignee of a lease, after breach, and sale of the lease at his request to lessen the damages, is liable for the rent to the time of the breach, and for the present value of the monthly payments due to the assignor in the future, at the legal rate of interest, less the sum for which the lease was sold.

Cross-appeals from a judgment of the superior court for King county, Neal, J., entered February 1, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Reversed on plaintiff's appeal.

Blaine, Tucker & Hyland and *Robert C. Saunders*, for appellant.

Farrell, Kane & Stratton, for respondent.

MOUNT, J.—The American Savings Bank & Trust Company brought this action against Z. A. Mafridge, personally and as executor of the last will of Katherine Mafridge, deceased, to recover damages in the sum of \$41,700 for breach of a contract, and to foreclose a deed given as security for the performance of that contract. Upon a trial of the case, the lower court found in favor of the plaintiff for \$4,000, being payments due upon the contract for two months past due, and ordered the trust deed foreclosed for that amount, but denied further relief. Mafridge has appealed from that decree.

The plaintiff, American Savings Bank & Trust Company, has also appealed, contending that the court erred in not finding for the plaintiff in a larger amount. The parties will, therefore, be designated herein as plaintiff and defendant.

There is no dispute upon the facts in the case, which are, in brief, as follows: In October, 1908, one Harry Welty was the owner by assignment of a lease upon certain premises

in the city of Seattle. This lease by its terms was to run until August 1, 1916, at a monthly rental of \$1,575 per month for the first five years. On October 12, 1908, Mr. Welty and Mr. Mafridge entered into the following agreement in writing:

"Memorandum of Agreement made between Harry Welty and Z. A. Mafridge Company of Seattle, a corporation, and Z. A. Mafridge personally.

"Whereas, Harry Welty is the owner of that certain lease made by Albert Hansen to the McCarthy Dry Goods Company on the building situated on lots five (5) and eight (8) in block twenty-three (23), A. A. Denny's addition to the city of Seattle, dated May 10th, 1906, and June 4th, 1906, said lease having been purchased by said Harry Welty from the receiver of the McCarthy Dry Goods Company, and

"Whereas, the said Z. A. Mafridge Company and Z. A. Mafridge personally is desirous of renting said premises from the said Harry Welty, it is agreed by the parties as follows:

"That the said Z. A. Mafridge Company shall pay for the use of the said premises, for the months of October, November and December, 1908, one thousand five hundred seventy-five (\$1,575) dollars per month, being the actual amount payable under the lease to Albert Hansen.

"It is further agreed that the next three months following said time, being January, February, and March of 1909, the said Z. A. Mafridge shall pay to the said Harry Welty, the sum of one thousand six hundred seventy-five (\$1,675) dollars per month, and

"It is further agreed that after said March, 1909, and during the remaining period of the lease between Albert Hansen and the McCarthy Dry Goods Company the said Z. A. Mafridge Company shall pay to Harry Welty the sum of four hundred twenty-five (\$425) dollars per month, in addition to and over and above the rent that the said Harry Welty or his successors in interest shall be obliged to pay to the said Albert Hansen, under the terms and conditions of the said lease heretofore referred to, and the said Z. A. Mafridge, personally agrees to secure the said Harry Welty in the payment of said sums by making a deed of trust of lots three (3) and six (6) in block one hundred seven (107) of D. T. Denny's First addition to North Seattle to the said Harry

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Welty or to the American Savings Bank & Trust Company in trust for such purposes, also half interest in triangular block twenty-eight (28) Heirs Sarah A. Bell's Second addition for like purpose.

"Nothing herein contained however shall in any way prohibit an outright purchase of the said lease at any time by the said Z. A. Mafridge Company or Z. A. Mafridge personally or his successors in interest under this agreement from the said Harry Welty or his successors in interest.

"In Witness Whereof the parties hereto have signed this memorandum of agreement this twelfth day of October, 1908.

(Signed)

Harry Welty,

"Z. A. Mafridge,

"Z. A. Mafridge Co.

"L. Orr, Manager.

"In case either piece of property is sold at request of Z. A. Mafridge, he shall furnish another piece of equal value as security for the purpose stated. American Savings Bank & Trust Co.,
J. P. Gleason, Mgr."

On October 28, 1908, Mr. Mafridge, in order to secure the performance of this contract, executed and delivered a deed, absolute in form, conveying to the plaintiff the property now sought to be held as security for the damages sustained. At the time the contract above set out was entered into, the defendant, Mafridge, took possession of the leased property and occupied the same, by himself or the Boston store, a corporation formed by him, which latter corporation subsequently went into the hands of a receiver, who paid the rent while he occupied the premises as such receiver, until the 1st day of May, 1909. The rent for May and June, 1909, was not paid. After the receiver was appointed, the defendant, Mafridge, requested the plaintiff to dispose of the lease to the best advantage. The plaintiff thereupon sold the lease to the original lessor for a consideration of \$10,000.

It is contended by the defendant upon this appeal, (1) that the contract above set out was not a valid one, because it is an agreement to lease the property for a term of years

and is not acknowledged; (2) that the contract is not a mutual, enforceable contract; and (3) that the plaintiff is not liable for any rent under the evidence. The trial court was apparently of the opinion that the contract above set out was not valid as a lease because it was not acknowledged. If this contract were one for a lease, there can be no doubt that it was not enforceable under the statute, for we have held that an unacknowledged lease for a term of years could not be enforced for the full term. *Richards v. Redelsheimer*, 36 Wash. 325, 78 Pac. 934; *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N. S.) 852; *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322.

This contract is clearly not a lease, nor an agreement for a lease. It was in law an assignment of a valid lease already existing. The plaintiff was the assignee of a lease expiring in August, 1916. The defendant agreed to purchase the lease and pay to the plaintiff certain stipulated sums each month for the whole period of the lease. The plaintiff reserved no interest in the leased premises. It is true the contract contained this clause: "Nothing herein contained, however, shall in any way prohibit an outright purchase of the said lease by the said Z. A. Mafridge Company or Z. A. Mafridge personally or his successors in interest." This meant, no doubt, that the parties might thereafter agree upon a lump sum in advance which should be paid for the whole term.

"An assignment of a term for years occurs when the lessee transfers his entire interest therein without retaining any reversionary interest. If an instrument so transfers the lessee's interest, it constitutes an assignment regardless of its character and form." 24 Cyc. 972.

"No particular form of assignment is necessary. Thus, as heretofore stated, a general lease, quitclaim, or other conveyance of the leasehold premises may render the grantee an assignee. Assignments, however, are usually and may be validly executed by indorsements upon the lease, whereby the lessee assigns his interest to the assignee." 18 Am. & Eng. Ency. Law (2d ed.), 679.

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In *Weander v. Claussen Brewing Ass'n*, 42 Wash. 226, 84 Pac. 735, 114 Am. St. 110, where a contract in the form of a lease was entered into by the lessee and a third party for the whole term of an original lease, we held that the contract, while in form a lease, was in law an assignment of a lease. We there said:

"We think, under the authorities, that the legal effect of such an instrument is that of an assignment in full of the lease by its holder; that it is not a new lease, which creates a new lessor and subtenant, with the relation of landlord and tenant between the two, but the new nominal lessee becomes an assignee of the whole leasehold estate affected."

See, also, *McLennan v. Grant*, 8 Wash. 603, 36 Pac. 682; 1 Tiffany, Landlord & Tenant, p. 908.

The contract under consideration, under the rule of law above stated, was an assignment of a lease, and does not fall within the statute which requires leases for a term of more than one year to be in writing.

We have no statute which requires an assignment of a lease for a term of years to be acknowledged. In *Tibbals v. Iffland*, 10 Wash. 451, 39 Pac. 102, this court said:

"But the interest conferred by a lease for a term of years, whether for a long or short period, is only a chattel interest (1 Wood, Landlord and Tenant (2d ed.), pp. 143, 149; Gear, Landlord and Tenant, § 2), and is generally subject to the law pertaining to chattels."

And we also there held that a married man has the right to assign and transfer a lease without the consent of his wife. Under these rules, the contract in question was a valid contract, capable of being enforced even though it was not acknowledged.

The contract appears upon its face to have been a mutual contract, based upon a sufficient consideration. Defendant also contends that he is not liable for the rents for the months of May and June, for the reason that plaintiff had accepted rent from the receiver for the month of April, and had re-

ceived the keys from the receiver prior to the month of May, but the evidence also shows that the plaintiff did not thereby release, or intend to release, the defendant from the obligations of his contract, but at all times insisted upon the defendant's liability. The defendant had, at least, constructive possession of the premises and a beneficial use thereof, and was liable upon the contract for the amounts due which he had agreed to pay. The sale of the lease by the plaintiff to the original lessor was made at the request of the defendant, for the purpose of lessening the liability of the defendant.

We now come to consider the appeal of the plaintiff. The trial court was apparently of the opinion that the contract was void and therefore not enforceable, and for that reason refused to find any damage on account of the rescission of the contract by the defendant. We have determined that the contract was valid and enforceable. It remains to consider the question of damages. The plaintiff insists that, in addition to the rent for May and June, amounting to \$4,000, judgment should have been entered for \$36,125, being \$425 per month, which defendant had agreed to pay, less \$10,000 for which the lease was sold, making a total of \$30,125. It is apparent that this amount is too large, because the defendant did not agree to pay that amount in advance. He agreed to pay the plaintiff \$425 per month for seven years and one month. The plaintiff is entitled to \$4,000 for the months of May and June, 1909, because the defendant had the use and benefit of the property for that time and was clearly liable therefor. The plaintiff is also entitled to the present worth of the contract from July 1, 1909, at the legal rate of interest, less the \$10,000 for which the lease was sold.

The judgment of the lower court is therefore reversed, and the cause remanded with instructions to enter a decree of foreclosure in accordance with this opinion.

RUDKIN, C. J., DUNBAR, CROW, PARKER, and GOSE, JJ.,
concur.

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[No. 8816. *En Banc*. September 20, 1910.]

THE STATE OF WASHINGTON, *on the Relation of the Great Northern Railway Company, Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Respondent*.¹

STIPULATIONS—COMPROMISE AND SETTLEMENT—CONSTRUCTION—EMINENT DOMAIN—PUBLIC USE—ESTOPPEL. Where lands wanted for railroad purposes are contracted to be sold to the railroad, in view of condemnation proceedings being instituted, the contract is material in such proceedings, being in effect a stipulation therein, and the owners are estopped therein from asserting that the land was not needed for a public use; and it is immaterial that the contract of sale was conditional upon an adjudication of title in the owners in a case then pending in court, where the owners obtained title by compromising such pending litigation; a voluntary settlement being as binding as a final judgment.

Writ of certiorari by both parties to review an order of the superior court for Spokane county, Hinkle, J., entered March 26, 1910, adjudging a public use and necessity as to part of the lands, and refusing it in part, in proceedings to condemn land for railway purposes, after a hearing on the merits before the court without a jury. Reversed on the railroad company's writ.

L. E. Chester and *J. J. Lavin* (*B. O. Graham*, of counsel), for plaintiff.

James Z. Moore and *Richardson & Laughon*, for respondent.

MOUNT, J.—Writ of review in condemnation proceedings. The Great Northern Railway Company brought an action in Spokane county to condemn a certain irregularly shaped tract of land to be used at the junction of the main line of that road with the Spokane, Portland & Seattle Railway. The trial court, upon the hearing of the preliminary question of the public use and necessity, adjudged the necessity and

¹Reported in 110 Pac. 808.

public use of a portion of the land sought, but refused such order as to a strip of land sought for the purpose of changing the county road near the point of such junction. The Great Northern Railway Company sued out a writ of review to that part of the order refusing condemnation, and the owners of the land, J. Z. Moore and wife, sued out a writ of review to that portion of the order adjudging necessity where the land sought was in excess of one hundred feet in width on each side of the center line of the railway

The facts are as follows: Prior to the time the action was begun, James Z. Moore and wife and the Spokane Country Club each claimed to own a tract of land containing 18.5 acres, adjoining the Great Northern Railway on the south, at the point where the Spokane, Portland & Seattle connection joined the main line of the Great Northern Railway. The title of this land was in dispute, and Moore and wife had brought a suit against the Spokane Country Club to have the title thereto adjudged in themselves and quieted against the claims of the Spokane Country Club. That action was pending in the superior court of Spokane county. The Great Northern Railway Company desired a small, irregularly shaped tract of land, of about two and one-half acres, lying within the larger tract above mentioned. About two acres of the tract desired formed a triangularly shaped piece for the use of the track connection between the two railways, and about one-half an acre was a strip sixty feet wide, extending south from the triangular piece to be used as a county road, which the railway company desired to construct in order to avoid a dangerous crossing of the railroad at that point. The railroad company, in order to acquire this tract, entered into a contract with Moore and wife, as follows:

"This memorandum of agreement made this 29th day of January, 1909, by and between James Z. Moore and Anna K. Moore, husband and wife, parties of the first part, and the

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Great Northern Railway Company, a corporation, party of the second part, witnesseth:

"That, whereas, an action is now pending in the superior court of Spokane county, state of Washington, between the parties of the first part and Spokane Country Club, involving the title to all that portion of the northwest quarter of section fourteen (14) in township twenty-five (25), north of range forty-two (42) east, lying east of the public highway, generally known as the Colville Road, and south of the right of way of the Great Northern Railway Company; and

"Whereas, the said parties of the second part desire to secure title to a portion of said above described tract of land;

"Now, therefore, this agreement witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, agree that in case the title to said above described tract of land is decreed by final judgment of the superior court of Spokane county, Washington, to be in said parties of the first part, then and in that event, said first parties hereby agree to sell and convey to the said party of the second part, by warranty deed, free and clear of all claims, liens or encumbrances, and the said party of the second part hereby agrees to purchase from said parties of the first part, the following described tract of land, to wit: [then follows a description of the land sought to be obtained in this proceeding] for the sum of five thousand dollars (\$5,000).

"And the said parties of the first part further agree that they will also convey to the said party of the second part, or to the county of Spokane, a tract or piece of land, 60 feet in width, for change of public highway over said northwest quarter of said quarter section fourteen (14). Said tract of land is shown colored red and marked 'Proposed Road Change' on blue print hereunto attached, and hereby made a part of this agreement; it being understood, however, between the parties hereto, that in the event the said first parties and the county commissioners of Spokane county, Washington, should desire to alter the route of the proposed public highway, then the said parties of the first part will donate free of cost to the said parties of the second part or to the county of Spokane, such route as may be mutually agreed upon between said first parties and said county commissioners.

"It is further understood and agreed between the parties hereto that in case said party of the second part deems it necessary to go upon said land at any time before a final determination of the controversy or suit now pending and hereinabove referred to, then and in that event it shall have the right, if it so elect, to enter condemnation proceedings against said first parties and against said Spokane Country Club, for the tract of land hereinabove described, and the said first parties hereby covenant and agree that in the event such suit is instituted by said second party, that the value of said land, together with the change of public highway, does not exceed five thousand dollars (\$5,000), which amount they hereby agree to accept as liquidated damages in full payment for said tract of land, the right of way necessary for the change of public highway and all damages to the balance of the land owned by said first parties; which amount of five thousand dollars (\$5,000) said first parties hereby agree to accept in full settlement of any and all claims they may have in and to the lands hereinabove described, and the second party agrees to pay said \$5,000 to first parties. It is expressly understood that if it shall be adjudged and decreed that the Spokane Country Club and not the parties of the first part to this contract, are the owners of the lands hereinabove described, then and in that event the first parties hereto shall acquire no rights whatsoever under or by virtue of this contract, and the same shall become null and void."

Thereafter, and before the final determination of the litigation between Moore and wife and the Spokane Country Club, and while that action was pending, the Great Northern Railway Company brought this action to condemn the lands now sought, which are the same as described in the contract above set out, and at the same time entered into possession of the premises and expended large sums of money in making the connections of the two railroads. Thereafter, on the trial upon the question of public use and necessity, the railway company offered the contract above set out in evidence. This was objected to upon the ground that it was immaterial, and upon the further ground that the lands described in the agreement were not decreed by final judgment of the superior

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court of Spokane county to be in James Z. Moore and wife, but that they purchased such lands from the Spokane Country Club pending an appeal to the supreme court from a judgment entered in the superior court in favor of the Spokane Country Club. The trial court sustained these objections and excluded the contract from his consideration, and finally entered an order adjudging the triangular piece necessary for a public use, but refused to so adjudicate the sixty-foot strip necessary therefor.

We think the trial court erred in excluding this contract. The evidence shows without dispute that the irregular tract sought in the action is for a public use, and necessary for the railway company. Moore and wife, however, argue that, under the statute, the railway company is not authorized to take a strip more than two hundred feet in width, while the property sought exceeds that width; and also argue that a strip sixty feet in width for a given road may not be taken by a railway company. If these positions may be maintained under the terms of the statute, which we do not now decide, we are satisfied that, where there has been an agreement that a certain tract or amount of land may be taken, as in this case, the contract will govern, and the same was therefore material in the case as between the railroad company and Moore and wife. The contract was entered into by the parties for a sale of the land for railway purposes. The amount of land and the price were specified, and Moore and wife cannot now be heard to say that the railway company shall take less than was agreed upon. The contract was made in view of the condemnation proceedings being instituted, because it was so recited, and states that such proceeding may be "for the tract of land above described," which is the same land sought. This contract was in the nature of a stipulation in the condemnation proceeding as to the amount of land and necessity therefor, and was binding as such upon the parties to it, and should have been so treated by the trial court.

It is argued that the contract is of no force, because it was not adjudged by the superior court of Spokane county that Moore and wife were the owners of the land. There is no force in this argument, because it was contemplated at the time the contract was entered into that Moore and wife were the owners of the land and would make their title good by the litigation. The fact that the case was compromised and settled by agreement pending the litigation, instead of by an adjudication, was wholly immaterial. The action was pending at the time the contract was entered into, and it was the duty of Moore and wife under the contract to prosecute the action to a final judgment. Instead of so doing, a compromise or settlement was made pending the litigation, which, of course, prevented a final judgment and had the same effect as though a final judgment had been entered in Moore's favor. The clause in the contract providing in case the Spokane Country Club are the owners, means that, if Moore and wife were finally adjudged not to be the owners so that they could not give title, then the contract should be void. A voluntary settlement made pending the litigation became as binding as a final judgment would have been. We are, for these reasons, of the opinion that the trial court should have granted the prayer of the petition against Moore and wife for the condemnation of the tract sought. With this view, it is not necessary to decide other points made in the case.

The judgment is therefore reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

RUDKIN, C. J., DUNBAR, CROW, PARKER, and GOSK, JJ.,
concur.

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Statement of Case.

[No. 8671. Department One. September 20, 1910.]

THE STATE OF WASHINGTON, *on the Relation of United
Tanners Timber Company, Plaintiff*, v. THE
SUPERIOR COURT FOR LEWIS COUNTY
*et al., Respondents.*¹

NAVIGABLE WATERS—FLOATABLE STREAM—LOGS AND LOGGING. A stream is navigable for the floatage of timber products, where during natural freshets occurring in the winter, spring, and fall, for varying periods of from one day to several days, it is floatable for saw logs, and is used at all times for floating shingle bolts; and the fact that use of the shores and improvements will add materially to the convenience does not affect the question of its navigability.

SAME—SHORE RIGHTS—DRIVING LOGS. Shore rights required to facilitate the driving of logs must be acquired by private treaty or condemnation.

LOGS AND LOGGING—BOOM COMPANIES—SITES. A boom company has a discretion as to the location of its boom site which cannot be controlled by the courts, in the absence of bad faith or legislative restriction.

SAME—NAVIGABLE WATERS—OBSTRUCTION BY BOOM. A boom company may temporarily obstruct a river for such time as may be necessary to sort and pass the logs of the owners below.

EMINENT DOMAIN—BY BOOM COMPANY—INTERESTS OF STOCKHOLDERS. The interest of the stockholders of a boom company in a lumber company and a connecting railway, inviting monopolistic control of the industry by them, is no objection to condemnation proceedings by the boom company; since the companies are public service corporations bound to give reasonable service and are amenable to control by the public authorities.

Certiorari to review a judgment of the superior court for Lewis county, Rice, J., entered February 23, 1910, after a hearing before the court, adjudging a public use and necessity in proceedings to condemn the use of the waters of a river for logging purposes. Affirmed.

Edward H. Wright, for relator.

Welsh & Welsh and *George Dysart*, for respondents.

¹Reported in 110 Pac. 1017.

GOSE, J.—The respondent Yeomans Boom Company, hereafter called the respondent, having complied with the laws of the state relative to boom and driving companies, filed its petition in the superior court of Lewis county for the purpose of condemning the right, as against the relator, to impound and release the waters of the Chehalis river above the relator's land, for the purpose of driving logs and timber products through the land of the relator to the respondent's boom below, together with the right to use the banks of the stream through its land to the extent of ten feet upon both sides thereof. The court adjudged the use to be a public one; that the public interest requires the prosecution of the enterprise, and that the respondent is entitled to condemn, and directed that a jury be impaneled to ascertain the relator's damages. The relator has obtained a writ of certiorari to review the judgment.

Its principal contention is that the Chehalis river is not a navigable or floatable stream in its natural state. Upon that question the court found:

"That said Chehalis river within the limits of petitioner's said plat of location, and in fact, at all places, is during the freshet season of each year, in its natural condition without the aid of artificial freshets navigable for the floatage of sawlogs and other timber products. That said Chehalis river is capable in its natural condition at ordinary recurring freshets, of being successfully and profitably used for the floatage of sawlogs and other timber products. That said Chehalis river at all places within petitioner's said plat of location and at all places in said river, is subject to periodical fluctuations in the volume and heights of its waters, attributable to natural causes and recurring as regularly as the seasons of the year, and during all of these times, is capable of floating logs and other timber products to and toward market, and these periods continue for a sufficient length of time to make it useful as a public highway for the floatage of logs and other timber products. That said Chehalis river in its natural condition, is navigable and floatable during the freshets, which occur with periodic regularity in the

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winter, spring and autumn of each year, for the floatage of logs and other timber products to mill and to market, but that at other seasons of the year said river is not navigable for the floatage of logs, but is for shinglebolts and that it is necessary in order to make said Chehalis river commercially more valuable for the floatage of logs and other timber products, to maintain and operate dams in said river within the limits of petitioner's said plat of location and by use of said dams to create artificial freshets with which to float or drive logs and other timber products down said river."

We think the finding is supported by the evidence. Without reviewing the record in detail, it suffices to say that it is shown that, during the recurring freshets which occur three or four times each year, the river is floatable for sawlogs for varying periods of from one day to several days each, and that it has been used by settlers upon the river above and below the lands of the relator for the purpose of floating shinglebolts. It is said that the river is not floatable within the meaning of the law, because the times when it can be so used are not of sufficient duration, and because the times when the freshets will recur cannot be accurately forecasted. It is, however, shown that they recur during the fall, winter, and spring seasons. Wherever the navigable capacity of a stream is not continuous, but is dependent upon the falling of the rain or the melting of the snow, the precise date at which it will occur will necessarily vary with the seasons and be somewhat conjectural. The objection that the freshets which cause the river to be floatable are not of sufficient duration goes more to the question of the value and utility of the stream as a public highway than to the legal aspect of the question.

It is shown, and the court found, that about a billion feet of merchantable timber is tributary to the river and within the respondent's plat, which at present has no outlet to market other than the river. The record shows that this timber is owned by about fifty persons. A stream which during naturally recurring freshets is navigable for floating logs

or timber is a public highway for that purpose. *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; *Kalama Elec. L. & P. Co. v. Kalama Driving Co.*, 48 Wash. 612, 49 Pac. 469; *State ex rel. Wilson v. Superior Court*, 47 Wash. 397, 92 Pac. 269. The same principle applies to a stream which contains sufficient volume of water to float shinglebolts in its natural state during annually recurring periods. *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813, 102 Am. St. 905, 70 L. R. A. 272. The rule is that, if the stream

"is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue to a sufficient length of time to make it useful as a highway, it is subject to the public easement." *Morgan v. King*, 35 N. Y. 454.

"Its perfect adaptation to such use may not exist at all times, although the right to it may continue, and be exercised whenever an opportunity occurs." *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. 848, 5 L. R. A. 392.

"If in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose [floating timber] at some seasons of the year, recurring with tolerable regularity, then in the American sense it is navigable, although the annual time may not be very long." *Hot Springs Lumber & Mfg. Co. v. Revercomb*, 106 Va. 176, 55 S. E. 580, 9 L. R. A. (N. S.) 894.

The condition of a stream, when its volume of water is increased by the falling of the rain or the melting of the snow, is as natural as when it is diminished by the drought; and it is a floatable stream if, from natural causes recurring periodically with reasonable certainty, the flow of the water will be sufficient to be substantially useful to the public for the transportation of the products of the fields and forests. The fact that the use of the shores will materially add to the convenience of driving the timber does not affect the question of the natural navigable capacity of the river. It is probably true that, in all such streams, the timber will congest or

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jam, and that the jams are more easily broken from the shore than from the body of the stream. As was said by Chief Justice Ryan, in *Olson v. Merrill*, 42 Wis. 203:

"A stream is none the less navigable because persons using it are induced by convenience to prefer unlawful to lawful means in aid of the use."

Where the use of shore rights is required to facilitate the driving of logs, they must be acquired by private treaty or by condemnation. *Watkins v. Dorris*, *Monroe Mill Co. v. Menzel*, and *Kalama Elec. L. & P. Co. v. Kalama Driving Co.*, *supra*.

It is next contended that the receiving boom should have been constructed about three miles below its present location; that the record shows that there is a feasible boom site at such point, and within a half mile from the line of the Northern Pacific railroad, and that the present site was selected with a view of giving the Pe Ell & Columbia River railroad a monopoly of the business. Several answers may be made to this contention: (1) The record does not show that the lower site is practicable; (2) the respondent has a discretion as to the place where it will locate its boom, which cannot, in the absence of bad faith, or except as restricted by the legislature, be controlled by the courts. 2 Lewis, *Eminent Domain* (3d ed.), § 604; 10 Am. & Eng. Ency. Law (2d ed.), p. 1057; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; *State ex rel. Murhard Estate Co. v. Superior Court*, 49 Wash. 392, 95 Pac. 488; *State ex rel. Milwaukee Term. R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175; and (3) the record shows that the line of road of the Pe Ell & Columbia River Railway Company extends from the town of Pe Ell to the boom site, a distance of four miles, and that the line of the Northern Pacific Railway Company extends through Pe Ell.

It is next contended that the respondent's boom completely obstructs the river. This contention is not supported by the record. The evidence is that the dam is so constructed that it

can be readily opened so as to permit logs consigned to other points to pass down the stream. In *State ex rel. Pealer v. Superior Court*, 58 Wash. 565, 109 Pac. 340, we said:

"It is apparent that they [the boom company] must obstruct the river above the dam at times, or cease to do business. The legislature, in granting the right to construct a boom and splash dams and drive logs and timber by artificial freshets, by necessary implication gave the right to obstruct navigation at times. It is, as the court found, unavoidable in accomplishing the purpose for which the respondents were created. . . . The use of a stream such as the Humptulips river, a stream two to three hundred feet in width, for the purpose of floating and holding logs, is necessarily at times an exclusive use, and either such right must be conceded or the business of floating logs in such streams must cease. The legislature, we think, contemplated the precise contingency."

See, also, *Lindsay and Phelps Co. v. Mullen*, 176 U. S. 126.

The temporary detention of logs for such reasonable time as it takes to sort them and to pass the logs of the various owners to the boom below, to which they may be consigned, is not within the prohibition of the law. *West Branch Boom Co. v. Pennsylvania Joint Lumber & Land Co.*, 121 Pa. St. 143, 15 Atl. 509; *Edwards v. Wausau Boom Co.*, 67 Wis. 463, 30 N. W. 716.

The facts, that stockholders of the respondent are heavily interested in the Pe Ell & Columbia River Railway Company, and that such road does not connect with the Northern Pacific Railway Company's line of road at Pe Ell, and that the stockholders of the respondent own the industry known as the Yeomans Lumber Company, require no extended consideration. Both the respondent and the Pe Ell Railway Company are organized as public service corporations, and if they fail to discharge their respective public duties, or exact unreasonable charges for their services, they are amenable to public regulation, and any gross abuse will not long remain uncorrected. Moreover, it appears that the Pe Ell Railway Company has practically completed arrangements with the North-

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ern Pacific railroad for track connections at Pe Ell, and for handling the latter's cars over its road.

The objection that the Pe Ell railroad does not connect with the public highway at the boom site requires only a passing notice. As a public service corporation, it has the right to condemn whatever land may be necessary for the discharge of its duties as a common carrier, and the presumption is that it will put itself in a position to receive whatever freight is offered at that point, without unnecessary delay. It is not important that, up to the time of the trial, it had carried no freight for parties other than the respondent. Being a public service corporation, as we have said, its duty is to receive all freight offered without discrimination, and there is no evidence that it has failed to discharge its duty in this respect. *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 844, 7 L. R. A. (N. S.) 198; *State ex rel. Hulme v. Grays Harbor & P. S. R. Co.*, 54 Wash. 530, 103 Pac. 809; *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637.

The judgment is affirmed.

RUDKIN, C. J., MORRIS, FULLERTON, and PARKER, JJ.,
concur.

[No. 7211. Department One. September 20, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. N. H. LILLIE,
Appellant.¹

ASSAULT AND BATTERY—DEADLY WEAPON—EVIDENCE—SUFFICIENCY. The evidence is insufficient to sustain a conviction for "assault with a hammer," where the prosecuting witness had the hammer when he was knocked down and stunned by the first blow, none of the witnesses for the state could testify that he was struck by the hammer, one testifying that he was knocked down by a blow with the fist, and defendant's testimony that he struck with his fist was corroborated by the circumstances.

CRIMINAL LAW — APPEAL—DECISION—REMAND—INDICTMENT—OFFENSES INCLUDED IN CHARGE. Upon reversal of a conviction for assault with a deadly weapon, for insufficiency of the evidence as to the higher offense, the evidence establishing assault only, the case will be remanded for sentence for simple assault, as that is embraced within the offense charged.

Appeal from a judgment of the superior court for Yakima county, Rigg, J., entered September 7, 1906, upon a trial and conviction of assault. Reversed.

Henry J. Snively, for appellant.

Henry H. Wende, for respondent.

GOSE, J.—The appellant was tried, convicted, and sentenced to imprisonment in the penitentiary, upon an information charging him with having made an assault upon the person of one L. M. Hilton with a deadly weapon with the intent to inflict a bodily injury, and has appealed from a judgment entered upon the verdict of the jury. The charging part of the information is as follows:

"He, the said Nevada H. Lillie, on or about the 25th day of April, 1906, A. D., in the county of Yakima, state of Washington, then and there being, did then and there wilfully, unlawfully and feloniously make an assault in and upon the person of one L. M. Hilton with a deadly weapon, to wit,

¹Reported in 110 Pac. 801.

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a hammer, which he then and there had and held in his hand, with the intent then and there to inflict upon the person of the said L. M. Hilton a bodily injury, no considerable provocation appearing therefor, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington."

At the close of the state's case, the appellant challenged the sufficiency of the state's testimony and moved for a dismissal of the case. He also urges here that there is not sufficient evidence to support the verdict of the jury, and that there is no substantial evidence tending to show that an assault was made with a hammer. We think the latter contention must be sustained. It is admitted that Hilton had the hammer when the altercation began. Hilton testified that the appellant first struck him on the side of the head "in the jaw," "with something, I do not know what;" that the blow "addled" and "stunned" him; that he was rendered "unconscious for some time;" that he is not conscious of having been struck more than one blow. He further states that, when he received this blow, he had the hammer in his hand; that "I know positively that he did not hit me with that hammer." This statement has reference to the first blow. Hilton has no further recollection of the altercation.

The state called one Arthur Harper, who bore testimony as follows: That Hilton was lying down when he first saw him; that he could only see his head and shoulders; that he could see all of appellant's body and his right arm as he was kneeling by Hilton; that when he first observed the appellant, he had a hammer "in his right hand, I think." Later he said: "I think he (meaning appellant) had the hammer when I first saw him, but I don't remember." To the inquiry, "What did he do with it?" meaning the hammer, he answered:

"I do not know. I think he struck Mr. Hilton with the hammer, but I would not be willing to swear that he did strike him. . . . He struck the man while I was around there, but whether he had the hammer in his hand when he struck the man I do not know. . . . He struck short blows when he

struck. Whether he had the hammer in his hand I do not know. . . . I thought at that time he did strike him with the hammer. There had been people talking to me there then in Granger every day, coming around and saying he struck him with the hammer, and they were all talking about it, and I thought at that time he did strike him with the hammer, but I was excited and scared and, as I said, I would not be willing to swear that he did strike him or that he did not strike him."

Russell Chamberlain, a boy ten years of age, was introduced by the state and testified, that the appellant advanced toward Hilton, "then he doubled up his fist and knocked Mr. Hilton down;" that he then saw the appellant's elbow "every time he hit him, go up;" that as the appellant walked away he heard Hilton exclaim, "Oh, dear me," to which the appellant replied: "I will learn you to steal a wrench from me." He further stated that he did not see the appellant strike with the hammer. No other witness testified to the assault.

Dr. Dempster, the attending physician, speaking to Hilton's wounds, said:

"Well, he had an open wound over the right eye, probably about two and one-half to three inches in length, following the bony portion of the upper wall of the eye in a sort of a half circle. That is one wound. His cheek was swollen up very badly, he was bleeding at the nose and he had a wound on his upper lip in his moustache. . . . Between the cheek bone and the bone here in front of the ear there is a bone, probably the size of a lead pencil and it is flat. It is not round and it is not very thick. It connects the cheek bone with this ear here. This was broken."

The doctor also stated, that Hilton was confined to his bed for three or four days; that the wounds were made with a blunt instrument; that he could not state the nature of the instrument that produced the wounds. In addition to this testimony, it is conceded that, as the appellant walked away from Hilton, he was carrying Hilton's hammer. Harper said that he had it in his right hand, whilst the boy and one Qualls asserted that it was in his left hand. There was blood

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on the handle of the hammer. One witness stated that there was some "blood" on the flat of the hammer. It is agreed that, after the assault, the appellant's hand was bleeding freely. The state's witnesses differed as to whether it was his right or left hand. Just after the assault, Hilton's face was bleeding. The appellant testified that he did not strike with the hammer. This statement is corroborated by the witness Moore. The appellant further stated that Hilton made an assault on him, and that he fought with his fists in self-defense.

However, in passing upon the sufficiency of the evidence to support the verdict, we will disregard the evidence of the appellant and accept the state's evidence as true. It is clearly insufficient to support the verdict as to the higher offense. As we have seen, no witness stated that Hilton was struck with the hammer. There is nothing but inference to support the verdict as to the higher offense charged, and the inference that Hilton was not struck with the hammer is much stronger than that he was struck with it. Hilton had the hammer when he received the first blow, and the appellant had it after the last blow had been struck. It is not only clear that the wounds could have been made with a blow from the clenched fist, but the evidence is convincing that they were made in this way. There is no evidence of more than one wound on the jaw. This wound, if we accept the testimony of the boy and Hilton, was made with the fist. If the appellant could inflict this wound by a blow with the fist, and if the blow was so severe that Hilton was thereafter unconscious, it is evident that the other and less serious wounds were made in the same way. The appellant's explanation, which we have quoted, is only explanatory of his motive in making the assault.

There is abundant evidence to support the verdict of the jury upon the question of the assault. The assault was unprovoked and aggravated. The crime of assault is embraced in the information. The liberty of the citizen is too sacred to be taken away on inference alone, when such inference

points more strongly to innocence than to guilt. While courts are reluctant to interfere with the solemn conclusion of the jury, yet their duty to do so in proper cases is clearly recognized by law. We cannot escape the conviction that the evidence to support the guilt of the defendant is too wanting in substance to support the verdict on the higher offense charged. A considerate regard for the rights of the appellant, therefore, demands that we hold the evidence insufficient to support the verdict for the higher of the two offenses.

Under the rule announced in *State v. Freidrich*, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332, the verdict of the jury will stand as to the crime of assault, and the case will be remanded to the superior court of Yakima county, with directions to enter a new judgment for assault, and to proceed thereon according to law.

RUDKIN, C. J., CHADWICK, and PARKER, JJ., concur.

Crow, J., concurs in the result.

[No. 8785. Department One. September 22, 1910.]

SPOKANE MERCHANTS' ASSOCIATION, *Respondent*, v. W. W. PARRY *et al.*, *Appellants*.¹

APPEAL—REVIEW—PLEADINGS—AMENDMENTS CONSIDERED AS MADE. An allegation in a complaint that plaintiff had received but \$69,788.77 and expended \$3,602.90 in conducting a business, will be considered on appeal as amended to conform to proof that upwards of \$76,000 had been received and a corresponding increase expended, where the trial court considered the complaint sufficient and allowed each party to present his entire case.

MORTGAGES—INSURANCE—RIGHTS OF MORTGAGOR. Where a mortgage in trust for creditors stipulated that the mortgagor should keep the premises insured, he cannot, in an action to foreclose the mortgage, charge the trustee as mortgagee with the loss of property by fire which such mortgagee had failed to insure.

¹Reported in 110 Pac. 991.

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MORTGAGES—FORECLOSURE—TRUST MORTGAGE—ACCOUNTING. Failure of the trustee to account for certain accounts and bills receivable will not prevent the trustee from foreclosing a mortgage given in trust for creditors, where enough appears to show the necessity for foreclosure; since he must fully account later for all receipts.

Appeal from a judgment of the superior court for Okanogan county, Taylor, J., entered November 15, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose mortgages. Affirmed.

Perry D. Smith, for appellants.

Warren W. Tolman, for respondent.

FULLERTON, J.—For some time prior to November 26, 1909, the appellant W. W. Parry owned and operated two general stores in Okanogan county, the one being located at Molson and the other at Tonasket. He also owned certain real property situated in the same county. On the date named he was indebted to divers wholesale dealers who had sold him goods and merchandise, in a sum exceeding \$65,000, and was insolvent. To secure an equal division of his property among his creditors he, together with his wife, executed and delivered to the respondent two mortgages, the one covering his real property and the other his stocks of merchandise, each of the mortgages being conditioned for the payment of the indebtedness at times specified and set forth in the mortgage. At the time of the execution and delivery of the mortgages, the parties entered into a written agreement, by the terms of which the appellants turned over to the respondent the general stores and the merchandise covered by the mortgages, with power to conduct and manage them during the life of the mortgages in such manner as it should deem most beneficial to the creditors, both of the appellants agreeing to render it such assistance as lay within their power. It was further provided that the proceeds of the business, after deducting the expenses of operation, should be

paid to the creditors of W. W. Parry, such payments to be made whenever the amount on hand equaled ten per cent of the claims.

The respondent conducted the business under the agreement for something over a year, when the store at Tonasket burned. The business was continued at the other store until August 14, 1909, when the respondent began the present action to foreclose the mortgages, alleging that it was no longer profitable to continue the business. In its complaint the respondent alleged that the debts of the appellants at the time of the mortgages amounted to the sum of \$69,788.77; that it had realized from the property turned over to it \$24,637.90; that it had incurred expenses amounting to the sum of \$3,602.90, and that the indebtedness remaining unpaid for which the mortgages stood as security amounted to the sum of \$50,223.50. An answer was filed putting in issue the allegations of the complaint as to the amount of the indebtedness, the expenses incurred, and the amount realized, and averring affirmatively that the respondent had realized more than \$90,000 from the assets turned over to it. This affirmative allegation was put in issue by a reply in the form of a denial. On the trial the court found that the respondent had fully accounted for all moneys received by it, and that there was a balance due on the indebtedness which the mortgages stood to secure of \$41,075.90, and entered a judgment of foreclosure for that sum.

The appellants first suggest a question of practice. On the trial of the case, the evidence introduced by the respondent showed that it had collected during the time it conducted the business, as proceeds thereof, upward of \$76,000, and was allowed, over the objection of the appellants, to show the disposition it had made of this money; namely, that it had expended it, with the exception of \$24,637.90, in the conduct of the business. It is urged here that this was error; that since the respondent had alleged that it realized only \$24,637.90 out of the business, and had incurred a necessary ob-

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ligation in so doing of \$3,602.90, it should not have been permitted to show the realization and expenditure of different sums, especially since it had denied the appellants' allegation that it had realized from the business a sum upwards of \$90,000, by a general denial. But it is a sufficient answer to this objection to say that the defect in the pleading, if any such there was, was an amendable defect; and inasmuch as the lower court treated the complaint as sufficient and allowed each of the parties to present his entire case thereunder, this court must treat it in the same way, and consider all amendments as made which might have been made. Rem. & Bal. Code, § 1752.

The burning of the store building at Tonasket caused a considerable loss, estimated by the appellants at \$10,000. It is urged that this should be charged to the respondent, because it had failed to keep the property insured. But we think the appellants are in no position to urge this claim under the circumstances shown here even were it a valid claim under any circumstances. By the express terms of the mortgage the appellants bound themselves to keep this mortgaged property insured against loss and damage by fire, and having failed so to do, they cannot charge the loss by reason thereof to the respondent. What claim the *cestuis que trustent* may have against the respondent for this loss, should the assets fail to pay them in full, we, of course, need not consider here.

It seems that certain accounts and bills receivable were turned over to the respondent with the other property, and it is claimed that these should have been accounted for before a foreclosure of the mortgages was allowed. But enough appears in the record to show a necessity for foreclosing the mortgages, and that is all that is necessary in the foreclosure action. The respondent must finally account for the entire property, the assets and bills receivable, as well as all other property it has received, or will receive, in virtue of the trust relation.

On the facts, we think the court reached a correct conclusion. The business seems to have been managed with fair business ability and with reasonable economy. Furthermore, the appellants were present during the entire time, had access at all times to the books, and were consulted constantly by the agents of the respondent as to the conduct of the business. The complaints against the method in which the business was managed would have been entitled to more consideration had they made them known prior to the commencement of the foreclosure proceedings.

The respondent asks us to increase the amount of the recovery, contending that the amount found due by the court is less than the amount shown to be due by the evidence by over \$3,000. But the judgment entered corresponds with the findings made by the court, and these we think are justified by the evidence.

The judgment will stand affirmed.

RUDKIN, C. J., GOSE, MORRIS, and DUNBAR, JJ., concur.

[No. 8695. Department One. September 22, 1910.]

GEORGE CATTERSON, *Respondent*, v. RUSSELL L. IRELAND
et al., *Appellants*.¹

VENDOR AND PURCHASER—PERFORMANCE—BREACH BY VENDEE—WAIVER—CONSIDERATION FOR PROMISE. Where the purchaser of land agreed to sow one-half of the same in wheat, and deposit one-half of the proceeds to be applied in deferred payments and interest, the acceptance by the vendor of such part of the proceeds does not waive defaults of the purchaser in failing to cultivate half of the land or pay the taxes; and surrender of such money belonging to the vendor would constitute no consideration for a promise to waive the defaults.

VENDOR AND PURCHASER—CONTRACT—BREACH BY VENDOR—DAMAGES—TENDER OF PAYMENT. In an action at law for damages for breach of a contract to convey premises, a legal tender of the amount due on the purchase price is necessary; and it is not suffi-

¹Reported in 110 Pac. 1002.

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Opinion Per FULLERTON, J.

cient that the purchaser merely asked the vendor if he would accept payment in full and he stated that he would not, where there was no production of the money or offer to produce it.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered October 27, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

W. W. Zent and John M. Cannon, for appellants.

C. J. Lambert and Southard & Southard, for respondent.

FULLERTON, J.—On August 17, 1906, the appellants and the respondent entered into a contract for the sale of real property, of the tenor and effect following:

“This agreement by and between R. L. Ireland and Anne Ireland, his wife, of Tacoma, Pierce county, Washington, parties of the first part, and George Catterson, of Wilson Creek, Douglas county, Washington, party of the second part.

“The first parties hereby agree to sell and the second party hereby agrees to buy all of section one (1), township twenty (20), north of range twenty-nine (29) east of the Willamette Meridian, containing 662.84 acres for the sum of ninety-four hundred twenty-nine and 75-100 (\$9,429.75) dollars, in the manner following, to wit: Twenty-five hundred (\$2,500.00) dollars in cash, the receipt of which is herewith acknowledged, and the balance, sixty-nine hundred and twenty-nine and 75-100 (\$6,929.75) dollars to be paid as hereinafter provided.

“Said party of the second part shall deliver at a warehouse on the line of the Great Northern railroad one-half of all the wheat raised on the land each year, properly sacked, free of expense to said parties of the first part, the receipts from the warehouse from said one-half the wheat are to be in the name of said parties of the first part and left at the Citizens Bank of Wilson Creek, Washington.

“Said party of the second part shall sell said wheat at his option any time previous to November 1st of each year. If not sold by November 1st the parties of the first part shall sell the wheat at that time and are to apply the proceeds on

this contract. The proceeds of the wheat disposed of each year shall be applied as follows:

"(1) Interest on all money due at eight per cent (8%).

"(2) Balance to be applied on principal until the entire debt, principal and interest, shall be paid in full.

"(3) It is further agreed that said party of the second part shall have the privilege of paying any additional amounts that he shall desire on this contract from year to year.

"It is also agreed that said party of the second part shall pay all taxes on the above described land before delinquency, commencing with the taxes for the year 1906 and that they shall keep fences in good condition.

"It is understood and made a part of this contract that said party of the second part shall in the spring of 1907 plow one-half of the tillable land in said section and put same into wheat in the fall of 1907, or the spring of 1908, and shall in the spring of 1908 plow the balance of the tillable land and put same into wheat in the fall of 1908 or the spring of 1909, and shall thereafter sow one-half of the land in wheat each year. The party of the second part shall cultivate the land in the best manner each year, taking care of the crop in due season, threshing, harvesting and properly protecting said wheat after it is harvested so long as the contract shall continue. After sown in fall wheat if said wheat be not in satisfactory condition by March 15th of each year, said land must be re-sown in spring wheat.

"It is understood and made a part of this contract that all the balance then unpaid shall be liquidated in full on November 1st, 1913. Therefore, upon final payment of principal and interest as stated in above contract, said first parties, their heirs or assigns, shall make said second party, his heirs or assigns, a good and complete warranty deed to said premises.

"In case of nonfulfillment by said second party of any of the above conditions herein and above specified, this contract shall be null and void so far as any right of title to said second party, and all amounts already paid by said second party shall be forfeited to said first parties as damages thereby liquidated for the nonfulfillment of this contract."

The respondent made the cash payment provided for on

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the delivery of the agreement and entered into possession of the property, but failed to comply with his contract in any other particular. He plowed only two hundred acres of the six hundred and sixty-two and a fraction acres the section contained during the spring of 1907, and in the spring of 1908 some eighty acres in addition; but the whole amount so plowed did not equal one-half of the tillable land on the section. The land plowed in 1907, he sowed to wheat in 1908, and realized therefrom, thirteen hundred and twenty-eight bushels, the proceeds of the sale of one-half of which he placed in a bank, where it was held awaiting the appellants' order. The wheat sold for \$531.20, but little more than one-third of the interest then due upon the remainder of the purchase price of the land. He also failed to pay the taxes assessed against the property then due.

In November, 1908, the appellants called upon the respondent for a settlement, and were paid the money then in the bank. Thereafter, in February, 1909, the appellants again called up the respondent for the purpose of obtaining some settlement of the matters between them, and entered into an agreement with him to the effect that he would surrender the contract and move off the premises in consideration that the appellants would waive all further claims against him. A written order on the person holding the contract, directing him to deliver it to appellants was made out and handed to the appellants, but before the appellants reached the depository the respondent countermanded the order, and the person holding the contract refused to deliver it over. At this time the question of settlement was again discussed, and various methods by which it might be accomplished were suggested, among which was the payment in full in cash of all the sums remaining due on the contract, including the taxes. No tender was made of these sums, nor was it shown that the respondent was able to pay them; the respondent and his counsel testified merely that the appellant Russell L. Ireland was asked by the respondent if he would

accept payment in full and stated that he would not. No settlement was effected, and shortly thereafter the appellants served upon the respondent a notice to quit, whereupon the respondent moved off the land and brought the present action against the appellants for a breach of the contract, laying his damages in the sum of \$5,353.92, the difference between the contract price of the land and its alleged value at the time the notice to quit was served. This action was tried before the court sitting without a jury, and resulted in findings and a judgment for the full amount claimed. This appeal was taken therefrom.

The trial court seems to have reasoned that the acceptance of the money deposited in the bank operated as a waiver on the part of the appellants of the defaults in the performance of the contract committed by the respondent, so that the contract stood, at the time of the attempted settlement, as one whose conditions had been performed as fully as either party was then required to perform them; that the statement of the appellants to the effect that they would not accept the amount due when inquiry was made of them at that time, and the subsequent serving of a notice to quit by the appellants, amounted to a breach of the contract on their part, justifying the respondent in removing from the land, and giving him a cause of action in damages.

But it has seemed to us that the court is in error in assuming that the acceptance by the appellants of the money derived from the proceeds of the crops operated as a waiver of the defaults in the other conditions. Such an assumption overlooks the fact that the respondent was under the same obligation to turn over the money as he was to perform the other conditions of the contract, and the acceptance of the payment could no more operate as a waiver of the conditions to plow and seed a certain number of acres of the land at a given time, than would the acceptance of the plowing and seeding operate as a waiver of the payment of the money. They were separate conditions, and the appellants had the

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right to exact the performance of each of them. It is said in the court's findings, although we find nothing in the evidence to support it, that the appellants agreed, in consideration of the payment, to waive the other defaults and restore the respondent to his full rights under the contract, but if this were true it would not alter the case. The respondent had no right to retain the money. It was the appellants' property, hence its surrender could furnish no consideration for such a promise.

Nor do we think the statement of the appellants, to the effect that they would not accept payment in full of the amount due on the contract, amounted to a waiver of a tender of the money. This was a law action for the breach of a contract, and the appellants have a right to rely on the legal rules governing tenders, and to insist that the respondent show a compliance therewith before they can be put in default. That the acts of the respondent and his attorney did not amount to a common law tender can hardly be doubted. There was no production of the money nor offer to produce it. On the contrary, it appears clearly that neither the respondent nor his attorney had any such sum under their control; the most that either one claimed was that a third person had expressed a willingness to buy the property if it could be obtained at the price the respondent had contracted to pay for it.

There was, therefore, no default of the terms of the contract on the part of the appellants, nor waiver on their part of the default of the respondent. To allow the respondent to recover was error, and the judgment will be reversed, and the cause remanded with instructions to enter a judgment to the effect that the respondent take nothing by his action.

RUDKIN, C. J., GOSE, CHADWICK, and MORRIS, JJ., concur.

[No. 8329. Department One. September 22, 1910.]

W. H. PLUMMER *et al.*, *Respondents*, v. GREAT NORTHERN
RAILWAY COMPANY, *Appellant*.¹

ATTORNEY AND CLIENT—CONTINGENT FEES—ASSIGNMENT OF CLAIM. An agreement to pay attorneys a contingent fee for the prosecution of a claim does not act as an assignment of a part of the claim, which is necessary to create an interest in a future recovery.

ATTORNEY AND CLIENT—FEES—LIEN—STATUTES. An action pending in some court in this state is necessary to secure to an attorney a lien under Rem. & Bal. Code, § 136, subd. 3, giving an attorney a lien for his compensation upon money in the hands of the adverse party in an action or proceeding in which the attorney is employed.

ATTORNEY AND CLIENT—FEES—RIGHT OF ATTORNEY—FOREIGN STATUTE. An attorney prosecuting an action for personal injuries in the courts of British Columbia under the workmen's compensation act, which precludes the attorney from taking any part of the recovery as a fee except such as is awarded by the arbitrator, cannot, after accepting the arbitrator's award, claim any other interest in, or lien upon, the recovery.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 21, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on implied contract. Reversed.)

L. F. Chester and J. J. Lavin, for appellant.

Geo. A. Latimer and W. H. Plummer, for respondents.

FULLERTON, J.—Some time prior to April 30, 1908, one Hilton G. Funk received personal injuries while in the employ of the Nelson & Fort Sheppard Railway Company, a branch line of the appellant, Great Northern Railway Company, located in British Columbia, and on that day employed Geo. A. Latimer, one of the respondents, to prosecute such actions or proceedings as would be necessary to recover for the injury, agreeing to pay him therefor one-half of any sum he

¹Reported in 110 Pac. 989.

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might recover as a fee for his services. Immediately thereafter, written notice of the terms of the contract was served by Latimer on the local claim agent and attorney of the railway company then having offices in the city of Spokane. After the execution of the contract, Latimer formed a partnership with his co-respondent, Plummer, and assigned to him a one-half interest in the claim. The respondents thereupon employed the legal firm of Taylor & O'Shea of Nelson, British Columbia, who instituted proceedings under the workmen's compensation act of British Columbia against the Nelson & Fort Sheppard Railway Company to recover for the injury to Funk. While these proceedings were pending and before anything pertaining to the merits of the claim had been determined, the claim agent of the Great Northern Railway Company, acting under the direction of one A. H. McNeill who had charge of the legal business of the appellant company in British Columbia, settled the claim with Funk, acting for himself, for the sum of \$500, and obtained Funk's written release of all claims against the appellant. The workmen's compensation act, under which the proceedings were pending, contains the following provision:

"Sec. 10. Any sum awarded as compensation shall be paid on the receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from the said sum awarded, except such sum as may be awarded by the arbitrator, on an application made by either party to determine the amount of such costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by said regulations."

After the settlement, and pursuant to this provision of the act, an arbitrator was appointed who awarded to solicitor O'Shea of the firm of Taylor & O'Shea the sum of eighty-five dollars, as costs and arbitrator's fees in the cause that had been instituted on behalf of Funk, and thereafter Taylor & O'Shea remitted one-half thereof to the respond-

ents. No suit or action was begun on behalf of Funk in the state of Washington, or elsewhere, other than the proceedings above mentioned.

The respondents thereupon began the present action against the appellant to recover a sum equal to one-half the sum paid Funk in the settlement, averring that they had a lien on the fund allowed him in the settlement as security therefor, and were deprived thereof by the payment of the same to Funk, who was then, and at all times since, insolvent, and well-known to the appellant to be so. The learned trial judge took the respondents' view of the law and entered a judgment in their favor for the sum of \$250, one-half of the amount paid Funk by the appellant in the settlement.

The cause was tried before the lower court without the intervention of a jury, and the case is before us on the findings of fact made by the court; the evidence not having been certified into the record. These findings we have recited in substance, and it will be observed therefrom that the court made no finding to the effect that there was any fraud or collusion between the appellant and Funk, entered into for the purpose of defrauding the respondents out of their fees, and in so far as the appellant is concerned at least, we must treat the settlement as having been made in good faith. It must be remembered, also, that it is the unquestioned right of parties to a lawsuit, or controversy of any kind, to settle and compromise their difficulties without consulting their counsel. Attorneys are but the representatives of the parties. Their authority is revocable at any time at the pleasure of the client, and they cannot legally object to any course their client may take concerning the matter in controversy. The rights of the attorney in this regard is not changed by the fact that the attorney is by agreement to receive as a contingent fee a part of the sum which may be recovered. Without an express stipulation to that effect, an agreement for a contingent fee will not act as an assignment of a part of the claim, and no interest in a future re-

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covery exists without an assignment. *McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924; *Lewis v. Chicago, St. P. & K. C. R. Co.*, 35 Fed. 639.

The right of the respondents to recover, therefore, depends on the fact whether they had a lien upon the money agreed to be paid Funk in the settlement. As there was no such common law lien, the lien, if any exists, must be derived from the statute. The only statute in our state that can be said to be at all applicable to the case is Rem. & Bal. Code, § 136, which reads as follows:

"An attorney has a lien for his compensation, whether specially agreed upon or implied, as hereinafter provided,

"(3) Upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party."

But we think it clear that, in order for a lien to arise from notice under this statute, there must be an action or proceeding pending against the adverse party in some court, and as the statute can have no extraterritorial effect, it must be an action pending in some one of the courts of this state. Any other rule would make the statute oppressive upon the debtor. He would be compelled to decide at his peril all controversies between the attorney and his client over the question as to which of them was entitled to the money in his hands. Moreover, the statute will bear no other construction. The lien is given "upon money in the hands of the adverse party in an action or proceeding," and this in itself presupposes an action or proceeding pending in a court.

Tested by the foregoing principles, it is plain that the respondents ought not to have been permitted to recover, and that the judgment of the trial court is erroneous for the reasons stated.

We think, however, the judgment is erroneous for another reason. The law of the forum in which the proceedings were prosecuted precludes the attorney from taking any part of

the recovery as a fee or reward, except such as shall be awarded him by the arbitrator. Having chosen that forum to prosecute the action, and having called upon the arbitrator to make an award, and having accepted the award so made, we think the respondents are estopped from claiming any other fee from their client. And having no cause of action against their client for fees, they cannot, of course, recover against the adverse party.

The judgment appealed from is reversed, and the cause is remanded with instructions to enter a judgment for the defendant to the effect that the plaintiffs take nothing by their action.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8864. Department Two. September 23, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Great Northern Railway Company, Plaintiff and Appellant*, v. RAILROAD COMMISSION OF WASHINGTON *et al.*, *Defendants and Appellants*.¹

RAILROADS—COMMISSION—ORDERS—RIGHT TO APPEAL—STATUTES. The provision in the railway commission law (Rem. & Bal. Code, § 8629), giving to railroad companies the right of appeal from orders of the superior court on reviewing orders of the railroad commission, was not intended to restrict the right of appeal to railroad companies, in view of Const., art. 4, § 4, giving the supreme court appellate jurisdiction in all civil cases, and Rem. & Bal. Code, § 1716, providing that any party aggrieved may appeal from the final judgment in any action or proceeding.

SAME—PARTY AGGRIEVED. The railroad commission has such an interest in defending its orders concerning railroad service and facilities, made in proceedings instituted by it, as to entitle it to appeal to the supreme court from orders of the superior court re-

¹Reported in 110 Pac. 1075.

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Syllabus.

versing the orders of the commission, under Rem. & Bal. Code, § 1716, giving the right of appeal to any party aggrieved by the final order in any action or proceeding.

SAME—ORDERS—RAILWAY SERVICE—REASONABLENESS—REVIEW. Orders of the railroad commission respecting railroad service and facilities will not be set aside on appeal as unreasonable, unless they clearly so appear, the presumptions being that they are reasonable.

SAME—ORDERS—EXTENSION OF SPUR TRACKS. An order of the railroad commission requiring the extension of a spur track so as to permit teams to load and unload cars at all points of the extension, is not unreasonable, where it appears that there is such a necessity for team facilities to avoid inconvenience and delay; and it is not unreasonable in that it directs the particular manner in which the service shall be furnished, where the railroad company failed to show that the service could be furnished in some other manner less burdensome to it.

SAME—TRAIN SERVICE. An order of the railroad commission requiring an additional train from Anacortes to Burlington and return, to connect with the noon trains on the main line, is not unreasonable, in the absence of proof that its operation would result in a loss, where it appears that Anacortes is a city of five or six thousand inhabitants at the western terminus of a branch line, sixteen miles from the main line, doing a freight business of \$20,000 per month, and \$800 for passenger fares, the present service furnishing only a morning mail service and no close connection with the noon trains in both directions on the main coast line.

SAME—STATION FACILITIES—RECORD—REVIEW. An order of the railroad commission requiring a railroad to furnish modern flush toilets at a depot waiting room in a town of 2,000 inhabitants is unreasonable, where there was no proof as to the inadequacy of existing facilities; and the same cannot be sustained on the theory that the commission found it necessary on "a view of the premises," since the law contemplates that all the evidence be preserved in the record for the purposes of review.

SAME—LOCATION OF DEPOT. An order of the railroad commission requiring a railroad depot to be moved five hundred feet, in a town of seventy-five people, is unreasonable, where the only reason therefor was to bring the depot to the point on the railroad nearest the business center of the town.

SAME—TRAIN SERVICE. An order of the railroad commission requiring a railroad to stop one of its passenger trains on flag at a town of seventy-five people, one and one-half miles from another town of the same size, where its trains stop, is not unreasonable, where there is a siding at such place, doing a freight business of \$2,738 in a year, a sawmill and a paint mill.

SAME. Orders of the railroad commission requiring a railroad to stop trains on flag at towns of 250 inhabitants, which were business centers of considerable importance, are not unreasonable, where such service would enable residents to visit their county seat and transact business and return the same day.

SAME—STATION FACILITIES. Orders of the railroad commission requiring a railroad to furnish running water for drinking purposes at its stations in small towns is unreasonable, in the absence of any evidence showing delinquency on the part of the company in the present service.

Cross-appeals from a judgment of the superior court for King county, Gay, J., entered November 20, 1909, on certiorari to review certain orders of the railroad commission, requiring the furnishing of railroad service and facilities, after a hearing before the court. Affirmed in part and reversed in part.

F. V. Brown and Frederic G. Dorety, for plaintiff.

The Attorney General and W. V. Tanner, Assistant, for defendants.

PARKER, J.—The railroad commission instituted an inquiry upon its own motion against the Great Northern Railway Company, touching the adequacy of service rendered and facilities furnished at different stations and places upon its line of railway. Hearings were had and evidence adduced relative to the matters involved, and at the conclusion thereof the commission made orders requiring the railway company to furnish certain services and facilities. The railway company, deeming itself aggrieved by certain of these orders, and desiring to have them reviewed and their reasonableness and lawfulness inquired into and determined, instituted proceedings in the superior court for King county for that purpose, as provided by § 8629, Rem. & Bal. Code. Thereupon that court, by writ of review, caused to be certified to it the orders and proceedings had before the commission relative thereto, including the evidence upon which such orders were based. Thereafter, upon a hearing in the superior court, it

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rendered judgment reversing certain of the orders and affirming others made by the commission. Thereupon the commission appealed to this court from the judgment of the superior court reversing certain of its orders, and the railway company appealed to this court from the judgment of the superior court affirming other orders made by the commission. We will not attempt to state the issues involved except as they will appear in our discussion of the particular orders in question, which we will deal with separately, after noticing some matters we deem best to dispose of preliminary thereto.

We are first confronted with a motion of the railway company to dismiss the appeal of the commission, upon the ground that the commission has no right of appeal. The contentions of learned counsel for the railway company upon this motion may be reduced to two propositions: (1) That the law does not give any right of appeal from the superior court save to the corporation whose duty to the public is being inquired into; (2) that, in any event, the commission is not a party in the sense that it can be aggrieved by the decision of the superior court. The provisions of the railway commission law relating to appeals from the superior court are found in § 8629, Rem. & Bal. Code, as follows:

“Said railroad, express, telephone or telegraph company shall have the right of appeal or to prosecute by other appropriate proceedings, from the judgment of the superior court to the supreme court of the state of Washington, as in other civil cases. In all such proceedings, however, bonds shall be required conditioned as hereinbefore provided in addition to the usual appeal bond.”

The additional bond here mentioned is the bond required by a preceding provision of this section as a condition precedent to the suspension of the orders of the commission pending a review thereof in the courts. Now, if the railway commission law was silent as to the matter of appeal from the superior court to the supreme court, it could hardly be seriously contended that the general law relating to appeals

was not ample to afford any aggrieved party the right of appeal from a judgment rendered by a superior court upon a review of orders of the commission. By that law it is provided, in § 1716, Rem. & Bal. Code:

“Any party aggrieved may appeal to the supreme court in the mode prescribed in this title from any and every of the following determinations, and no others, made by the superior court, or a judge thereof, in any action or proceeding.

“(1) From the final judgment entered in any action or proceeding,”

In art. 4, § 4, of our constitution, it is provided:

“The supreme court shall have . . . appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars. . . .”

We do not quote this constitutional provision with a view to arguing that the state may not withhold the right of appeal from one of its officers or commissions when made a party to an action or proceeding involving a matter of public concern only, but only as indicating the general liberal policy of our laws in allowing appeals to our court of last resort. In view of these statutory and constitutional provisions, we are not inclined to deny the right of appeal to the commission, in the absence of some special statute clearly evidencing the legislative intent to that effect. The only evidence we have of such an intent by the legislature is the provisions of § 8629 above quoted, which in terms seems to give the right of appeal to the railway company, with no provision therein as to an appeal by the commission or other party that may have instituted the proceedings in the first instance. If we need to look for a reason for the mentioning of the appeal by the railway company to avoid the conclusion that it was not intended to accord this right to the commission or other original complainant, it may be found in the special provision relat-

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ing to giving bond other than the usual appeal bond in connection with the appeal by the railway company.

It may be well argued, as suggested by learned counsel for the commission, that the matter of appeal by the railway company was only mentioned in this statute for the purpose of prescribing the conditions upon which it might prosecute such appeal. It was certainly unnecessary to there give the right which was already so clearly given by the general appeal law. In any event, we are of the opinion that the mere absence of any express provision in the railway commission law giving the right of appeal to the commission, notwithstanding other provisions therein, does not give rise to an inference of sufficient strength to take from the commission the right of appeal so plainly given by the general law on that subject; providing, of course, the commission has such an interest in the matter as to be an aggrieved party.

It is argued by learned counsel for the railway company that the commission is not concerned officially or otherwise with the questions here involved; that while the law has conferred upon it the right to institute the inquiry by complaint before itself, and conduct the proceeding and make orders thereon, it can go no further, because the legislature has not in terms authorized it to do so. This argument, carried to its logical conclusion, would mean that, in a case where the inquiry was instituted at the instance of the commission, and its orders thereon were brought before the superior court for review, as they were in this case, the superior court would review such orders *ex parte*, hearing no one save the railway company. This is not analogous to a case appealed from a purely judicial tribunal where the tribunal appealed from has determined questions of private right between litigants. Of course, such a tribunal has no legal interest in maintaining its judgment. This commission is not such a tribunal. True, it acts in a sense judicially when it renders its decisions and makes its orders upon a hearing, but it acts in an altogether different capacity when it makes the preliminary complaint

and seeks to have its decisions and orders enforced. It seems to us the very fact that it is authorized to institute, upon its own motion, such an inquiry, must mean that it is authorized to do so in the interest of the public, just as a prosecuting attorney is authorized to file an information charging a crime. It is the public that is in effect the plaintiff in such a case, though in form the case is conducted in the name of the commission as plaintiff. If the commission has authority of this nature in the very inception of the matter when nothing is established against the company whose service is being inquired into, surely the right of the commission to defend its decisions and orders, which are presumed to establish the rights of the public, must exist when such decisions and orders are sought to be reviewed in the superior court. It would be strange, indeed, that the first right and duty should exist without the second. The public, which the commission represents and is acting for, is certainly as much interested in maintaining the validity of a decision or order made in its interest as it is in the institution of the inquiry which brings about such decision or order. In the first instance there is no presumption as to what the rights of the public are; while in the second, we have a decision presumably correctly establishing such rights. There are really stronger reasons calling for a defense of the final decision of the commission when assailed in court than there is for instituting the original inquiry. Of course, there was no occasion to provide for a review of the commission's orders at its own instance in the superior court in a case instituted originally upon its own motion.

These observations lead us to conclude that the commission has the right to defend its orders when assailed in the superior court, and it is but taking another step, and that a logical one, to hold that the commission may defend its orders in the interest of the public when they are assailed in the supreme court by an appeal from a decision of the superior court affirming such orders. Why, then, may not the commission

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defend its orders by itself appealing from a decision of the superior court when that court has reversed such orders? It seems to us the right of the commission to defend its orders must include the right to use all lawful means to that end, and surely an appeal from the superior court is one of such lawful means. A situation very similar to this was dealt with in *Ouachita County v. Rolland*, 60 Ark. 516, 31 S. W. 144, where an order of the county court relating to the granting of a license was reversed by the circuit court, and the judge of the county court appealed from such reversal to the supreme court of the state, claiming the right to do so under a statute which made it his duty to defend such a case in the courts. Here we have no statute specifically making it the duty of the commission to defend its orders and decisions in the courts, but we think its right to do so is equally as clear as if there was a statute to that effect. In that case the court said:

“Section 1270, Sand. & H. Dig., provides: ‘When appeals are prosecuted in the circuit or supreme court, the judge of the county court shall defend the same.’ No other authority, in this respect, it seems, has been given. The extent of that given is not well defined, as it is not clear what is meant by the words ‘shall defend the same.’ It is obvious that the authority conferred by them was given for the purpose of protecting the interest of the county, which may be involved. It would be against the liberal policy of the law to so limit it as to deny him the right to take an appeal when the county may be aggrieved by the judgment of a circuit court. As a general rule, all parties aggrieved are allowed to take appeals from all judgments of the circuit and inferior courts. There can be no good reason why counties should be denied the same right, except as to judgments of the county courts. As to these judgments, it would serve no useful purpose to give the county judge the right to appeal, as it is presumed that, having rendered the judgments, he would never see the occasion for exercising it. But it is different as to judgments of the circuit courts which affect the interest of a county. The statute recognizes this difference when it says: ‘When appeals are prosecuted in the circuit or supreme court,

the judge of the county court shall defend the same.' But how is he to 'defend the same'? Necessarily by taking such action as will secure or protect the interest of his county as he shall see it. By imposing this duty upon him the statute incidentally and necessarily invested him with the right to use those remedies provided for that purpose. Among these one of the most valuable is the right to appeal to the highest court."

See, also, *Ex parte Morton*, 69 Ark. 48, 60 S. W. 307; *State ex rel. Schintgen v. La Crosse*, 101 Wis. 208, 77 N. W. 167; *Moede v. County of Stearns*, 43 Minn. 312, 45 N. W. 435. We are of the opinion that the commission, acting for the public, has such an interest in the matter as entitles it to appeal.

The validity of the orders of the commission here involved depends upon their reasonableness. So the question for us to determine is, Are those orders unreasonable requirements of the railway company, in view of its property rights and its duty to the public? In the examination of these questions we are to remember that neither the superior court nor this court is the original tribunal for determining, in the first instance, what services or facilities may be reasonably required of the railway company. The commission is to determine that, in view of the facts brought before it in each particular case. The courts are only to determine whether or not the commission has, in the particular case, exceeded the bounds of reasonableness in its orders requiring services and facilities, and in determining that question the courts are to indulge in the presumption that the commission has acted within the bounds of reasonableness, and hence has acted lawfully. It must clearly appear to the contrary before its orders can be set aside. Rem. & Bal. Code, § 8634. *Northern Pac. R. Co. v. Railroad Commission*, 57 Wash. 134, 106 Pac. 611; *Minneapolis etc. R. Co. v. Railroad Commission*, 136 Wis. 146, 116 N. W. 905; *Morgan's etc. R. Co. v. Railroad Commission*, 109 La. 247, 33 South. 214; *Atchinson T. & S. F. R. Co. v. State*, 23 Okl. 210, 100 Pac. 11; *Interstate*

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Commerce Commission v. Illinois Cent. R. Co., 215 U. S. 452.

We will now proceed to examine the question of the reasonableness of each particular order involved in the appeals.

One of the orders of the commission was to the effect that the present spur track at the station of Custer be extended at least two hundred feet, and that the approaches thereto be cleared so as to permit teams to load and unload at all points along such extension. This order was reversed by the superior court, and is involved in the commission's appeal. It appears from the evidence that there is often a necessity at this station of having facilities for unloading cars to and from teams direct, to the extent of eight or more cars at the same time. At present the railway company has a spur track at this station so situated that it affords opportunity for the unloading or loading of one car only to or from teams at the same time. On the opposite side of the main track from this spur, there is a passing track so situated that it affords opportunity for the unloading or loading of only five cars to or from teams at the same time, and cars are often placed upon this passing track for that purpose as well as upon the spur. There are times when there is a necessity for team facilities to the extent of twelve cars. Considerable delay and inconvenience are experienced in the loading and unloading of cars upon the passing track, on account of the switching which necessarily has to be done there.

The principal contention of learned counsel for the railway company is, in substance, that the railway company should be permitted to choose the manner of furnishing such facilities, and that the order of the commission should go no further than to direct it to furnish the same, without directing the manner of so doing. It seems to us, however, that the logical result of this argument would be, in the majority of cases, to leave the order of the commission so vague and uncertain as to render its enforcement impracticable. This order is not unreasonable simply because the increased facilities are directed to be furnished in a particular manner.

It was, no doubt, the privilege of the railway company to show to the commission upon the hearing that there was some other manner of furnishing the increased facilities, equally good for the public and less burdensome for the railway company.

We can easily imagine a case where the making of an order by the commission directing the furnishing of a service in a particular manner, when another manner of so doing would be of equal value to the public and less burdensome to the railway company, would be so unreasonable as to call for reversal by the courts. It is argued that the order is unreasonable in this particular, since it appears that the passing track can be rendered available for more teams loading and unloading by filling for a distance alongside thereof, thus creating a longer driveway. We are not advised by the evidence that one of these methods would be less burdensome to the railway company than the other in the way of expense. There is clearly room for contention that the public would be better served by an extension of the spur where the shipper will probably be less inconvenienced by switching of passing trains, than by the extension of a roadway upon the passing track. The facts here shown do not, in our opinion, so clearly establish the unreasonableness of this order as to warrant interference therewith by the court. The increased facilities seem necessary to public convenience, and it does not appear that the manner in which they are directed to be furnished by the order is unreasonably burdensome upon the railway company. We conclude that the judgment of the superior court reversing this order of the commission should be reversed. It is so ordered.

Another order of the commission was to the effect that the railway company cause an additional passenger train to be run from Anacortes in the forenoon so as to connect with the north and south-bound trains at Burlington at approximately the noon hour, and returning leave Burlington for Anacortes within thirty minutes after the arrival of these trains. This

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order was reversed by the superior court, and is involved in the commission's appeal. This order was made with a view to a better train service for the people of Anacortes, and was the result of the facts developed at the hearing, in substance as follows: Anacortes is a town of five or six thousand inhabitants, situated in Skagit county, at the western terminus of the Rockport branch of the railway company's lines, about sixteen miles west of Burlington, where that branch crosses the main north and south coast line of the railway company. This main line connects the cities of Seattle, Everett, Bellingham, and Vancouver, B. C. Mount Vernon, the county seat of Skagit county, is also on this main line, about four miles south of Burlington. The total amount of business done by the railway company at Anacortes is about \$20,000 per month for freight, and about \$800 per month for passenger fares, the latter representing about the same number of passengers. This is the only rail communication between Anacortes and Mount Vernon.

The evidence indicates that the travel by rail between Anacortes and the county seat would probably be considerably increased if the extra train service was furnished as ordered, a considerable part of that travel being at the present time by road vehicles on account of the inconvenient train service. At the time of the hearing, the first train left Anacortes at 7:15 a. m., returning at 9:50 a. m. Another train left Anacortes at 5:45 p. m., returning at 8 p. m. A freight train, bringing mail, and also passengers if they cared to ride thereon, arrives at Anacortes from Burlington generally about 5 p. m., though it is scheduled to arrive earlier. Through trains on the coast line arrive from both directions at Burlington at about the noon hour, with which there is no close connection for Anacortes. The present train service has the effect of furnishing only a morning mail service to Anacortes so far as the arrival of mails is concerned, the afternoon and evening trains arriving too late for distribution until morning. Upon the showing of these facts, the commission an-

nounced that, unless a showing was made indicating that the running of a midday train from Anacortes to Burlington and return would result in loss to the railway company, such a service would be ordered to be furnished. No such showing was attempted prior to the making of the formal order. However, the railway company put on an additional train leaving Anacortes at 10:45 a. m., arriving at Burlington about an hour later, and upon its return from Rockport arrived at Burlington at 9 p. m. and at Anacortes at 10 p. m. This train, it will be noticed, helped the passenger service to some extent by arriving at Burlington a short time before the noon hour, but not in returning, and did not have any material effect on the mail service so far as the arrival of mails at Anacortes is concerned.

We think these facts show that the train service ordered by the commission would be a materially better service than that which the railway company is furnishing; even with the added train put on since the hearing, and we have seen that there is no showing that such train service as so ordered by the commission would be unreasonably burdensome upon the railway company by being operated at a loss. It may be that, in view of the train service now furnished to Anacortes, this additional service ordered by the commission is not such a service as could be reasonably required of the railway company upon a showing that its operation would result in a material loss to the railway company. But, in view of the facts shown, it seems to us that this order is not so clearly unreasonable that it calls for interference therewith by the courts. It follows that the judgment of the superior court reversing this order of the commission should be reversed. It is so ordered.

Other orders made by the commission were to the effect that the railway company be required to install modern flush toilets, accessible to depot waiting rooms, at certain stations. These orders were reversed by the superior court, and are involved in the commission's appeal. These orders are discussed by counsel as though the facts upon which they were

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based are substantially the same at the several stations, taking the facts shown by the evidence relative to Colville as the basis for their arguments. We will deal with the question in the same manner.

Learned counsel for the commission do not point in their brief to any evidence in the record showing the present toilet facilities furnished by the railway company at Colville or any other of the stations. In view of the burden of the argument resting upon them to show error of the learned trial court in reversing these orders of the commission, we do not feel called upon to search this voluminous record for evidence showing the nature of such facilities, but will presume there is no such evidence. There is evidence tending to show that there is a water works system in the town rendering it practicable to install modern flush toilets, and so far as this record indicates, this seems to be the only fact which prompted the commission to make the order. It seems to us that such a showing alone is not sufficient to establish the necessity for such toilets at the station. There should be at least some evidence produced at the hearing tending to show that there was some neglect of duty on the part of the railway company in furnishing toilet facilities. The mere fact that modern flush toilets could be furnished does not establish such result. It is plainly the spirit of the railway commission law that the commission is to make orders of this nature only upon the production of evidence before it, showing a necessity for the facilities ordered. This, of course, can be shown either by proof of no existing facilities, or by proof of inadequate existing facilities. There was no proof of either in this case. It is possible that a particular appliance or facility may be so common for a given service that it could be said no other appliance or facility is suitable therefor, and in such a case, possibly, it could be lawfully ordered by the commission to be supplied by the railway company, by a mere showing that it was not being used in a service required to be furnished the public. But it cannot be assumed, without any proof of what

toilet facilities the railway company is furnishing, that modern flush toilets are the only proper facilities for service of this nature in a town of two thousand inhabitants, as this evidence shows Colville to be.

Our attention is called to the fact that the commission viewed the stations. If this is meant as a suggestion that we are to presume that its members thereby acquired information as to existing facilities, and possibly based their orders upon such information as well as upon the evidence produced before them, it should be replied to by pointing out that the law clearly contemplates that all the evidence upon which the commission bases an order of this nature is to be preserved in some permanent form, to the end that *all of it* be certified to the court upon a review. Upon no other theory could the court determine the reasonableness of the commission's orders. If an order can rest upon information obtained by a view of the members of the commission, without such information being in any manner brought before the court upon a review, then no order could be held to be either reasonable or unreasonable, legal or illegal by the court, except such an order as would so show by its own terms. In such a case the presumption of reasonableness would practically destroy the right of review in the courts, in view of the fact that no evidence can be received before the court, the question being determinable there only upon the evidence produced before the commission, and by it certified to the court. The hearing before the commission is viewed by the reviewing court very much as any other trial in a lower tribunal is reviewed by a reviewing court. There must be some evidence to support the determination of the tribunal hearing the matter, or its determination cannot stand when properly challenged in the reviewing court. Indeed, this *judicial nature of the hearing* before the commission, in view of the want of opportunity to produce evidence in the courts touching the reasonableness of the orders, is what really saves the law from being unconstitutional. *State ex rel.*

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Oregon R. & Nav. Co. v. Railroad Commission, 52 Wash. 17, 100 Pac. 179; *Chicago M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418. We assume that all of the evidence upon which the commission based its order is before us, as the law clearly contemplates that it shall be in order that the right of judicial review be fully secured. Notwithstanding the presumption as to the reasonableness of the orders, we are of the opinion that there is such a want of evidence in this record showing inadequate toilet facilities at the several stations named that the orders of the commission for the furnishing of modern flush toilets are unreasonable, and therefore unlawful. The judgment of the learned superior court reversing these orders of the commission is affirmed.

Another order of the commission was to the effect that the station building at Lamona be moved from its present location to a point about five hundred feet distant. This order was reversed by the superior court, and is involved in the commission's appeal. The facts shown upon which this order was made are, in substance, as follows. Lamona is a town of about seventy-five people. The station building is now located within five or six hundred feet of the point upon the railway nearest the business center of the town. This is the point to which the station building was ordered removed. There does not appear to be any reason for moving the station building to this point other than to bring it that much nearer to the business center of the town. There does not appear to be anything in the lay of the ground rendering the station building other than easy and convenient of access at present. Its present location appears to have been prompted by what seems to be a rule of the railway company of keeping their station buildings, where practicable, one hundred and fifty feet or more away from other buildings on account of fire, and also because its present location enables an engine to take water from the tank while the train is at the station, though that could probably be done at the proposed new location, since it is about an equal distance from the tank

on the opposite side. These facts, it seems to us, show that the order was unreasonable. We agree with the views of one of the commissioners who dissented from this order, saying: "I dissent on the ground that I think that, when a station is located in a town on level ground, that a distance of five hundred feet from its most central point is not sufficient grounds to order a removal from that point." We are of the opinion that the judgment of the superior court reversing this order should be affirmed. It is so ordered.

Another order of the commission was to the effect that the railway company cause one passenger train in each direction to stop at Kulzer' Spur on flag, and that the same be shown upon the next published schedule, leaving the railway company to elect as to which of its trains would so stop. This order was reversed by the superior court, and is involved in the commission's appeal. It appears from the evidence, in substance, as follows: Kulzer's Spur is a little over one and one-half miles south of the station of Valley, where the trains stop. Kulzer's Spur is a town or community of seventy-five people, being nearly as large as Valley, where its residents are now required to take the trains. The railway company has a siding there, but nothing more. There is a sawmill, and also a paint mill there. In 1898 the railway company received \$2,738 from freight shipped and received at this siding. It might seem that this is a very short distance from the regular stopping place at Valley to require the railway company to stop its trains for passengers, but in view of the population centered there and the very slight service required of the railway company, we do not think this order can be said to be so clearly unreasonable as to warrant an interference therewith by the courts. The learned counsel for the railway company call our attention to the case of *State ex rel. Railroad & Warehouse Comrs v. Minneapolis & St. Louis R. Co.*, 76 Minn. 469, 79 N. W. 510, in support of their contentions. In that case it appears that an order of the commission required much more service than

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does this order, and besides, the point where the station was directed by that order to be established was only seven-tenths of a mile from an established station on the same line. It is also to be remarked that that decision was rendered by a divided court. We conclude that the learned superior court was in error in reversing this order of the commission. Therefore its judgment to that effect is reversed.

Other orders of the commission were to the effect that the north-bound forenoon train and the south-bound afternoon train should stop at Blue Creek on flag, and that the north-bound forenoon train should stop at Arden on flag. The order as to Blue Creek was reversed by the superior court, and is involved in the commission's appeal; while the order as to Arden was affirmed by the superior court, and is involved in the railway company's appeal. We will notice these orders together, since we think they rest upon facts so near alike as to call for the same disposition. These towns are business centers of some considerable importance, each having approximately two hundred or more inhabitants. They are situated in Stevens county south of Colville, which is the county seat of that county, and on the same line of railway. The stopping of these trains as ordered would enable the residents of these towns to visit their county seat, transact business therein, and return the same day, which otherwise they cannot do with the present train service.

There is no doubt of the desirability of this proposed service, so far as public convenience is concerned, at those points. These trains are through trains, making connections with other lines at Spokane on the south, and also at other points on the north. The only reason seriously urged against the stopping of these trains as ordered is that it would tend to lengthen the running time of the trains, and that other small towns might demand similar service and thus result in preventing the making of the connections as at present, thus inconveniencing the public more than this proposed service would benefit the public. It does not seem to us, however,

that the evidence shows that these stops would result in breaking present connections, and we think we are now only called upon to consider the possible conflict between these proposed stops and the other service which might be directly affected thereby. When other stops of this nature directly affect other service, it will be time enough to consider their effect thereon. We cannot say that these orders of the commission are so plainly unreasonable as to cause them to be subject to reversal by the courts. We therefore conclude that the judgment of the superior court reversing the order of the commission as to Blue Creek should be reversed, and that the judgment of the superior court affirming the order of the commission as to Arden should be affirmed.

Other orders of the commission require of the railway company "that running water be installed in each of the waiting rooms" at the stations of Ferndale, Sedro-Woolley, Stanwood, Leavenworth, Wilson Creek, Orient, Colville, and Newport. These orders were affirmed by the superior court, and are involved in the railway company's appeal. These orders are all dealt with by counsel for both sides as though they were based upon substantially the same state of facts, taking the facts relative to Colville as the basis of their argument. So we feel warranted in doing the same. This running water, we assume from counsel's argument, is ordered to be installed for the purpose of drinking, though the orders are silent upon that question. All of the information we have as to the kind of drinking water facilities which are at present furnished by the railway company at Colville is contained in the following evidence:

"Q. What kind of drinking water is supplied in the waiting room now? A. I could not say. I never drank any of it. Q. How is it provided? A. I believe it is in a tank, a little reservoir. Q. Not running water in the station. A. No, sir."

It seems to us the views we have expressed relative to the order for modern flush toilets disposes of this running water

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problem. The various methods of furnishing drinking water facilities in public places are sufficiently well known to enable us to take notice that running water is not the only sanitary method, or necessarily the best method, of furnishing drinking water in such places. For aught this record shows, the railway company may be furnishing distilled water; or it may be furnishing ice water, with ample periodical changes to keep it pure and sanitary. For aught this record shows, the railway company may be furnishing much better water than the running water would be if furnished in compliance with this order. We are not assuming that the railway company is doing so. We are only pointing out that there was no proof to the contrary. As we have attempted to show in discussing the orders for toilets, there must be some proof of some delinquency in a service on the part of the railway company which the public is entitled to have before any order can be lawfully made by the commission for the furnishing or bettering of that service. We are of the opinion that these orders were unreasonable for want of proof to support them, as above indicated. The judgment of the superior court affirming these orders of the commission is therefore reversed, and the orders of the commission are also reversed and annulled.

There was originally involved in this appeal other orders, but they do not appear to be any longer in controversy. We therefore deem it unnecessary to notice them.

In view of this disposition of the appeals, each party will pay its own costs in this court.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8529. Department Two. September 24, 1910.]

THE STATE OF WASHINGTON, *on the Relation of J. S. Hall,*
Respondent, v. E. F. WICKER, as Police Justice of
*Kalama, Washington, Appellant.*¹

JUSTICE OF PEACE—JURISDICTION—MUNICIPAL CORPORATIONS—VIOLATION OF ORDINANCES—STATUTES—AMENDMENT. The amendment of Bal. Code, § 4683, which conferred upon justices of the peace jurisdiction in all criminal causes arising under any city or town ordinance, by Rem. & Bal. Code, § 46, which omitted the reference to city ordinances and provided that justices shall have jurisdiction of all misdemeanors, does not deprive justices in towns of the fourth class of jurisdiction in causes arising under a town ordinance, in view of the intent of the amending act to merely enlarge the jurisdiction, and of Rem. & Bal. Code, § 7735½, providing that the violation of any ordinance of a town of the fourth class shall be a misdemeanor.

JUSTICE OF PEACE—VENUE—CHANGE OF VENUE—POLICE COURT—MUNICIPAL CORPORATIONS—ORDINANCES—VIOLATION. A change of venue lies from a police justice to a justice of the peace, in prosecutions for the violation of a town ordinance, under Rem. & Bal. Code, § 1774, granting the right to a change of venue in justice court, and § 7748, providing that a police justice in towns of the fourth class shall be governed by the general laws relating to justices of the peace.

Appeal from an order of the superior court for Cowlitz county, McCredie, J., entered September 7, 1909, granting a change of venue in a prosecution for the violation of a city ordinance, upon reviewing on certiorari an order of a police justice denying defendant's motion therefor. Affirmed.

W. G. Drowley and *Robert E. Tunstall*, for appellant.

John F. Dufur and *Homer Kirby*, for respondent.

CROW, J.—On July 10, 1909, a criminal prosecution was instituted before E. F. Wicker, police justice of Kalama, a city of the fourth class, charging J. S. Hall with the violation of a city ordinance. Upon arraignment the defendant

¹Reported in 110 Pac. 992.

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filed his motion for a change of venue, supported by affidavit. The motion was denied, and the police justice, against the defendant's protest and without further appearance by him, admitted evidence, adjudged him guilty, and imposed a fine. Thereupon he applied to the superior court of Cowlitz county for a writ of certiorari to review the order refusing the change of venue. A writ was issued, and upon final hearing an order was entered remanding the cause with directions to grant the change of venue. From this order, the police justice, as defendant in the certiorari proceeding, has appealed.

Objections of the appellant to the form of the application for the writ are so technical and devoid of merit that we will not discuss them in this opinion. Was the respondent entitled to an order granting a change of venue? This identical question was answered in the affirmative in *Puyallup v. Snider*, 13 Wash. 572, 43 Pac. 635. The decision in that case was predicated in part upon Hill's Code, § 25 (Bal. Code, § 4683), which conferred upon justices of the peace jurisdiction in all criminal causes arising under any city or town ordinance. The section was amended in 1901, but the affirmative delegation of the jurisdiction mentioned was continued therein. It was further amended, Laws of 1909, page 377, ch. 98 (Rem. & Bal. Code, § 46), and now reads as follows:

"Justices of the peace shall have jurisdiction concurrent with the superior courts of all misdemeanors and gross misdemeanors committed in or which may be tried in their respective counties: *Provided*, That justices of the peace in cities of the first class shall in no event impose greater punishment than a fine of five hundred dollars, or imprisonment in the county jail for six months; and justices of the peace other than those elected in cities of the first class shall in no event impose greater punishment than a fine of one hundred dollars, or imprisonment in the county jail for thirty days."

Appellant insists that the omission of the words contained in the former section now deprives justices of the peace of

jurisdiction over criminal causes arising under any city or town ordinance, and that no change of venue can now be obtained from a police justice to a justice of the peace. Section 1774, Rem. & Bal. Code, granting the right to a change of venue, and § 7748, Rem. & Bal. Code, relating to the courts of police justices in cities of the fourth class, and providing that all civil or criminal proceedings therein shall be governed and regulated by general laws of the state relating to justices of the peace, are the other sections upon which the opinion in *Puyallup v. Snider*, *supra*, was predicated, and are still in force. Did the amendment of Bal. Code, § 4683, by the act of 1909 (Rem. & Bal. Code, § 46), deprive justices of the peace of jurisdiction in criminal causes arising under city or town ordinances? It is evident that the amendment was adopted for the purpose of increasing the penalties that may be imposed in criminal cases by justices of the peace in cities of the first class. The section as it now reads directs that justices of the peace shall have jurisdiction of misdemeanors. Section 7735½, Rem. & Bal. Code, provides that the violation of any ordinance of a town of the fourth class shall be a misdemeanor, and may be prosecuted in the name of the state, the identical form in which the prosecution herein is being conducted against the respondent Hall. *State v. Fountain*, 14 Wash. 236, 44 Pac. 270. Notwithstanding the change in Bal. Code, § 4683, made by the act of 1909, we hold that, under § 7735½, Rem. & Bal. Code, a justice of the peace still has jurisdiction over criminal prosecutions for the violation of city ordinances, and that the rule announced in *Puyallup v. Snider* is controlling in this action.

The judgment is affirmed.

RUDKIN, C. J., PARKER, DUNBAR, and MOUNT, JJ., concur.

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[No. 8747. Department Two. September 24, 1910.]

THE STATE OF WASHINGTON, *on the Relation of F. D.*
McCullough, Respondent, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—REFUNDS—RECOVERY—STATUTES—RETROACTIVE LAW. Rem. & Bal. Code, § 7892, providing that any funds in the treasury of a city belonging to the fund of a local improvement district after the payment of the whole cost thereof, shall on demand be repaid to the payors of the fund in cases where the assessment roll had theretofore been filed as well as in cases where it had not been filed at the time of the passage of the act, was intended to be retroactive, and removes the bar of the statute of limitations for the recovery thereof, where the same was passed at the next session of the legislature after a decision of the supreme court upholding the two-year statute of limitations from the delinquency of the assessment as a reasonable one, the city having no moral right to the money, and the ascertainment of the amount often being postponed beyond the two-year period.

LIMITATION OF ACTIONS—REMOVAL OF BAR—CONSTITUTIONAL LAW—DUE PROCESS. The legislature has power by a retroactive law to take away the natural right of a municipal corporation to plead the statute of limitations against a moral claim which in good conscience it ought to pay; and the same does not violate the due process clause of the constitution.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 14, 1910, in favor of the plaintiff, upon overruling a demurrer to the application, granting a writ of mandate to compel a city to pay surplus funds collected upon assessments for a local improvement. Affirmed.

Scott Calhoun and *Howard A. Hanson*, for appellant.

Todd, Wilson & Thorgrimson, for respondent.

CROW, J.—During the year 1905, the city of Seattle, by proper procedure, ordered the improvement of certain streets,

¹Reported in 110 Pac. 1008.

created a local improvement district, levied and collected special assessment No. 1025, paid the cost of the improvement therefrom, and then had remaining in the special fund an excess of \$1,085.99. The relator, F. D. McCullough, by assignment, represents a number of property owners who made payments into the fund. It is conceded that, if he is entitled to any recovery whatever, the sum of \$304.06 is due and payable to him. Demand was first made upon the city by the relator or his assignors on June 14, 1909, for repayment of \$304.06, and was refused. The relator, on February 18, 1910, applied to the superior court of King county for a writ of mandamus to compel payment. The city demurred, for the reasons that the application did not state facts sufficient to constitute a cause of action, and that the action had not been commenced within the time limited by law. The demurrer was overruled. The defendant refused to plead further. Final judgment awarding a peremptory writ was entered, and the defendant has appealed.

The assessment became due on July 6, 1905, and no demand for repayment of any part of the excess was made by the respondent until June 14, 1909. Under the decisions of this court, announced in *Müller v. Seattle*, 50 Wash. 252, 97 Pac. 55, and *State ex rel. McCullough v. Seattle*, 53 Wash. 655, 102 Pac. 770, the claims of the respondent were barred on and after July 6, 1907. Respondent, while admitting that under the cases cited he could only recover upon a demand made within two years after the assessment was payable without penalty or interest, now predicates his right to a recovery upon chapter 107, Laws of 1909, page 387 (Rem. & Bal. Code, § 7892), since enacted, which he contends has removed the bar of the statute and deprived the appellant of its right to plead the same. In response to this contention, the appellant insists (1) that the act of 1909 was not intended to be retroactive and does not cover cases where the two-year limitation had already run; and (2) that, if it was intended to be retroactive, it is to that extent invalid, as it

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violates the provisions of the state and Federal constitutions that no person shall be deprived of property without due process of law.

Did the act of 1909 restore to respondent a right of recovery upon a claim previously barred; or in other words, did it deprive the appellant of its right to plead the statute of limitations which had theretofore run? In arriving at the intention of the legislature, it is necessary to consider and understand the conditions and circumstances existing at the time the statute was enacted. The right of the city to levy by proper procedure a special assessment, in an amount required to pay for the completed local improvement, cannot be questioned, but it would scarcely be contended that it would be authorized to knowingly or intentionally levy such an assessment for any greater sum and appropriate the surplus to other purposes. It is apparent, however, that in some instances excessive assessments have been levied, the result possibly of honest mistakes and miscalculations in making preliminary estimates. The excess of such assessments, over and above the legitimate cost and expense of the local improvements, when collected by the city rightfully, equitably and morally belongs to the property owners in proportion to their payments into the special fund, and should be returned to them in like proportions. The Seattle city charter, § 17, art. 8, provides:

“Any funds remaining in the treasury belonging to the fund of any local improvement district after the payment of the whole cost and expense of such improvement, in excess of the total sum required to defray all the expenditures by the city on account thereof, shall be refunded, on demand, to the amount of such overpayment; and if there shall be such an excess in the assessment of any person who shall not have paid his assessment a rebate shall, on demand, be allowed to such person to the amount of such over-assessment: *Provided*, Such demand hereinbefore provided for be made within two years from the date upon which the assessment for such local improvement district became due. Any such funds remaining in the treasury after the expiration of two years.

from the date aforesaid for which no demand has been made as herein provided, belonging to any local improvement district, after the payment of the whole cost and expense of such improvement shall be transferred to the general fund."

This court, in *Miller v. Seattle*, and *State ex rel. McCullough v. Seattle, supra*, held the limitation thus fixed to be a reasonable one, and enforced the same. Many cases, however, might occur, and doubtless have occurred, in which, by reason of delinquencies in payments of installments and delays in making final settlements with contractors, the excess of assessments collected by the city could not, or would not, be ascertained within the two-year limit fixed by the charter. No claim for repayment could be prosecuted until the excess money was actually collected in the special fund and definitely ascertained. The act of 1909 was passed at the first session of the legislature which followed the announcement of the decision of this court in *Miller v. Seattle*, above mentioned, and was doubtless intended to afford relief which this court could not, under the existing law, grant. An examination of the entire act convinces us that it was intended to be retroactive. It first provides, "that any funds in the treasury of any municipal corporation belonging to the fund of any local improvement district after the payment of the whole cost and expense of such improvement, in excess of the total sum required to defray all the expenditures of such municipal corporation on account thereof, shall be refunded, on demand, to the payers into such fund." This language indicates an intention on the part of the legislature to direct that all municipal corporations in this state shall perform the duty of returning to property owners funds rightfully belonging to them, the same being funds to which the municipal corporations have no moral or equitable claim, and to make such duty apply to all funds in the control of the municipality at the date of the enactment of the law, without regard to any previous bar under the statute of limitations. In other words, it was the evident intention of the legislature

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to compel the discharge of a moral obligation by the cities of this state. The statute further provides that:

"No action shall be commenced in any court to obtain any such refund, except upon such demand, and, in all cases where the assessment roll shall have been filed with the treasurer of such municipal corporation for collection on or after the day this act shall take effect, until ninety days after making such demand, *and in all cases where such assessment roll has heretofore been filed for collection*, until six months after making such demand in accordance herewith." Rem. & Bal. Code, § 7892.

We hold the statute was intended to authorize a recovery by property owners in all cases where the proceeds of any assessment in excess of the amount needed for the cost and expense of the improvement remained in the custody of the city at the time of its enactment.

Appellant further contends that the act of 1909, if retroactive, is to that extent invalid, as it violates the provisions of the Federal and state constitutions that no person shall be deprived of property without due process of law. While conceding that, in *Campbell v. Holt*, 115 U. S. 620, the supreme court of the United States held to the contrary, the appellant insists that the arguments and conclusions of Mr. Justice Bradley, contained in his dissenting opinion, are unanswerable; that they have been followed and approved by a majority of the state courts; that we should now adopt his views instead of following the majority opinion, in which it was held that the right to defeat an action for debt, by pleading the statute of limitations, is not a vested or property right which cannot be taken away or destroyed by subsequent legislative enactment, repealing the statute of limitations. Unquestionably there is a sharp conflict of authority upon the question whether the matured right to plead the statute of limitations, in an action or upon a demand for money or debt, is a vested or property right within the meaning of the constitution. Many state courts, in cases in

which private individuals asserted a vested or property right to plead the statute after its repeal, have rejected the majority opinion in *Campbell v. Holt*, *supra*, and followed the dissenting opinion of Mr. Justice Bradley. In this case, however, a municipal corporation, the city of Seattle, insists that its vested right to plead a complete bar cannot be taken away or destroyed without violating the fourteenth amendment to the constitution of the United States. In *State v. Aberdeen*, 34 Wash. 61, 74 Pac. 1022, action was commenced by the state of Washington to recover ten per cent of certain license fees collected by the defendant city. It was conceded that the state's right of action for a portion of these fees had been completely barred prior to the enactment of § 1 of chapter 24, page 26, of Laws of 1903 (Rem. & Bal. Code, § 167), by which Bal. Code, § 4807, was so amended as to provide:

"That no previously existing statute of limitation shall be interposed as a defense to any action brought in the name of or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to the adoption of this act, nor shall any cause of action against the state be predicated upon such a statute."

The state contended that the act of 1903 deprived the city of its right to plead the statute as to the claims previously barred, while the defendant city contended that the retroactive feature of the act violated the provision of the Federal and state constitutions that no person shall be deprived of property without due process of law, and that, when its right to plead the statute had once matured, it became a vested or property right which could not be taken away or destroyed by subsequent legislation. The position thus assumed by the city of Aberdeen was, in substance and effect, identical with that of the appellant in this action. This court, in disposing of the contention thus made by the city of Aberdeen, called attention to the fact that the obligation there involved (like unto the one now before us), was asserted against a

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municipal corporation, a subordinate subdivision of the state government, and citing numerous authorities, said:

"The plenary powers of the legislature over municipalities of its own creation have been held to be greater than those pertaining to private corporations or individuals, and, in pursuance of the exercise of such powers, it has been held that the legislature may compel municipalities to pay debts or claims not strictly binding in law, but which are just and equitable in their character and involve a moral obligation. . . . In *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521, it was held that it is competent for the legislature to impose upon a city the payment of claims, just in themselves, but which, for some irregularity in the proceedings creating them, cannot be enforced at law. It was further held that a law requiring a municipal corporation to pay such a claim is not within the provision of the constitution of Louisiana inhibiting the passage of a retroactive law. . . . In *Sinton v. Ashbury*, 41 Cal. 525, 530, the court said: 'It is established by an overwhelming weight of authority, and, I believe, is conceded on all sides, that the legislature has the constitutional power to direct and control the affairs and property of a municipal corporation for *municipal purposes*, provided it does not impair the obligation of a contract, and by appropriate legislation may so control its affairs as ultimately to compel it, out of the funds in its treasury, or by taxation to be imposed for that purpose, to pay a demand, when properly established, which in good conscience it ought to pay, even though there be no legal liability to pay it.' See, also, *People ex rel. Blanding v. Burr*, 13 Cal. 343; *Creighton v. San Francisco*, 42 Cal. 446; *Grogan v. San Francisco*, 18 Cal. 590; *Town of Guilford v. The Board of Supervisors, etc.*, 13 N. Y. 143; *Lycoming v. Union*, 15 Pa. St. 166; *Mayor etc. v. Sehner*, 37 Md. 180; *Commonwealth v. M'Gowan*, 4 Bibb. (Ky.) 62, 7 Am. Dec. 737."

On the question as to whether the legislature has the power to compel a municipal corporation to recognize and pay a just moral obligation not enforceable in law, there seems to be but little, if any, conflict of authority. The general rule, sustained by ample citation of authority, is well stated in 8 Cyc., at page 943, in the following language:

"The legislature may compel municipal corporations to

pay claims not enforceable at law or in equity, when they are morally binding, may force municipalities in their public character to incur obligations necessary for the performance of their governmental duties, and may create municipal tort liability."

See, also, *Abernethy v. Medical Lake*, 9 Wash. 112, 37 Pac. 306; *State ex rel. Traders' Nat. Bank v. Winter*, 15 Wash. 407, 46 Pac. 644; *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Lewis County v. McGeorge*, 47 Wash. 414, 92 Pac. 268; *Mayor of Guthrie v. Territory*, 1 Okl. 188, 31 Pac. 190; *County of Caldwell v. Harbert*, 68 Tex. 321, 4 S. W. 607.

In *State v. Seattle*, 57 Wash. 602, 107 Pac. 827, this court said:

"Clearly the legislature has the power to take away from a municipality the right to plead the statutes of limitations, whether the statute has run its full course or not, if the matter involved is only of public concern and does not involve any property right of the city."

The city is under a moral obligation to repay the excess assessments to the respondent in proportion to the payments into the fund heretofore made by his assignors. No property right of the city is here involved, and the legislature had authority to require repayments even though the statute of limitations had fully run at the time it enacted the statute upon which the respondent now relies.

The judgment is affirmed.

RUDDIN, C. J., PARKER, DUNBAR, and MOUNT, JJ., concur.

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[No. 8820. Department Two. September 24, 1910.]

WILLIAM URQUHART, *Respondent* v. A. J. COSS *et al.*,
Appellants.¹

APPEAL—PRESERVATION OF GROUNDS—OBJECTIONS. General objections to an original mortgage are not sufficient to raise the point that its execution had not been proven.

CHATTEL MORTGAGES—VALIDITY—RIGHTS OF SUBSEQUENT CREDITORS. A subsequent creditor of a mortgagor cannot assert the invalidity of a chattel mortgage for want of acknowledgment and affidavit of good faith, where he had acquired no lien until the mortgagee had obtained possession and title in discharge of the debt; and any interest of a third person could not help such a creditor.

SAME—PRIORITIES—MORTGAGEE IN POSSESSION — ATTACHMENT BY SUBSEQUENT CREDITORS. The transfer of the possession and title of mortgaged chattels to a *bona fide* mortgagee, in satisfaction of the debt, is valid as against an attachment by a subsequent creditor, without regard to the validity of the mortgage.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered January 31, 1910, upon findings in favor of a third party, claimant to attached property, after a trial on the merits before the court without a jury. Affirmed.

Zent & Cannon, for appellants.

R. S. Hamilton and *Lovell & Davis*, for respondent.

Crow, J.—On October 22, 1909, C. H. Stever commenced an action in the superior court of Adams county against J. W. Johnson to recover debts claimed to be due, and caused an attachment to be issued therein and levied on certain personality as the property of the defendant. Thereafter William Urquhart, as claimant, filed an affidavit in which he alleged that he was entitled to the possession of the property, and that he was the owner thereof at the time of, and prior to, the attachment. The trial court made findings in his favor,

¹Reported in 110 Pac. 1001.

awarded him the property, and the sheriff, A. J. Coss, and C. H. Stever have appealed.

The trial court, in substance, found the following facts, which we conclude are sustained by the evidence: That on February 25, 1908, J. W. Johnson mortgaged to William Urquhart the personal property in controversy; that the mortgage, although signed, was not acknowledged; that no affidavit of good faith was attached thereto; that from November 5, 1908, to March 5, 1909, Johnson incurred certain unsecured personal obligations to the appellant Henry Stever and his assignors, for the recovery of which Stever instituted action and caused the writ of attachment to be issued, which, on October 25, 1909, was levied on the property in controversy; that prior to October 21, 1909, J. W. Johnson had transferred all of his rights in the property to Urquhart in satisfaction of his debt; that on October 21, 1909, Urquhart had taken possession under his mortgage and under the absolute transfer by Johnson, and that the mortgage had been filed with the auditor of Adams county on February 25, 1908, and properly indexed.

The appellants contend that the trial court erred in admitting the mortgage in evidence. It was offered by respondent to disclose the transaction between himself and Johnson, and show a valid consideration for the surrender and release of the property to respondent prior to appellant's attachment. It was the original mortgage, produced by the county auditor from his official files, and a certified copy has since been substituted in the record. Appellants' objections to its admission were interposed in the following language:

"Defendants object on the ground that the same is incompetent, irrelevant and immaterial, and for the further reason that the same is an original, if anything, and this court can not extract one of the files from the auditor's office for any purpose whatsoever, and for the further reason that the same is not properly identified and is not binding upon the defendants, and is void, absolutely void, on its face."

The principal contention at this time is that the execution

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of the mortgage was not shown, nor was Johnson's signature proven. The respondent had theretofore testified without objection to the execution of such a mortgage by Johnson. Appellants' objection that the signature was not proven is made for the first time in this court. When objections are not sufficiently definite to call the attention of the trial court to the particular grounds upon which they are based, error cannot be predicated thereon. One purpose of introducing the original mortgage was to show that it had been filed in the auditor's office, it being produced by him. Had a special objection that it had not been signed by Johnson been interposed, the respondent would doubtless have submitted proof of its execution.

Appellants, citing Rem. & Bal. Code, § 3660, contend that, for want of any acknowledgment or affidavit of good faith, the mortgage was absolutely void as to the appellant Stever, he being a creditor, and that he is now entitled to hold the property under his attachment. The evidence shows that Stever became a creditor after the execution and delivery of the mortgage. This court construed Rem. & Bal. Code, § 3660 in *Roy & Co. v. Scott, Hartley & Co.*, 11 Wash. 390, 39 Pac. 679. In that case the defendant McNaught became a general creditor of Scott, Hartley & Co., the mortgagor, after the execution of the mortgage and bill of sale. He later became a judgment creditor, and levied an execution upon the property covered by the mortgage and bill of sale. The holder of the chattel mortgage and bill of sale commenced foreclosure, making McNaught a defendant. McNaught contended that the mortgage and bill of sale were void as to him, taking the position now assumed by the appellant Stever. It was shown that McNaught became a creditor after the execution of the mortgage and bill of sale, and this court said:

"Nor do we think that this objection can avail the appellant McNaught, who, as we have already seen, was not a creditor at the time when the instrument was executed and re-

corded. The statute makes the chattel mortgage (unaccompanied by the affidavit) void only as 'against creditors of the mortgagor or subsequent purchaser and incumbrancers of the property for value and in good faith.' The word 'subsequent' relates not to creditors, but to purchasers and incumbrancers. As between mortgagor and mortgagee the instrument was valid and binding as a mortgage without the affidavit, and McNaught, being at that time a mere stranger to the property and having no interest in it, cannot invoke the aid of the statute which favors a class to which he does not belong."

Under this ruling, the mortgage held by respondent was undoubtedly valid as against the appellant Stever, who had obtained no lien before the respondent obtained possession and asserted title.

The mortgage was undoubtedly valid as between the respondent, the mortgagee, and Johnson, the mortgagor. The evidence shows that, on October 17, 1909, the mortgagor agreed to surrender the property, then in the possession of one Snowhill, to respondent Urquhart, in satisfaction of the debt thereby secured; that he directed respondent's attorney to take immediate possession; that Snowhill, whose interest or claim, if any, has not been shown, refused to surrender the property to respondent, who thereupon delivered to the sheriff of Adams county a notice of foreclosure sale under which the sheriff, on October 21, 1909, seized the property, delivered it to the respondent, taking his receipt therefor, and that the respondent has at all times since been in exclusive possession. Snowhill does not appear to have made any claim to the property, nor has he since questioned the validity of the mortgage, the possession, or title of respondent. His interest, if any, cannot be considered in this action, nor can it aid the appellant Stever. It is apparent that respondent secured possession with the knowledge and consent of Johnson, and at his instance; that Johnson transferred his title to the respondent, who was in possession asserting such title before appellant levied his attachment; that respondent was a *bona fide* creditor of Johnson; that his claim was a legal and suffi-

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cient consideration for the transfer of the property to him by Johnson, and that he had been a creditor long before appellant or any of his assignors acquired their claim. Without regard to the validity of the mortgage, the satisfaction of Johnson's debt and the transfer of the property by him, prior to appellant's attachment, were sufficient to sustain respondent's possession and title.

The judgment is affirmed.

RUDKIN, C. J., PARKER, DUNBAR, and MOUNT, JJ., concur.

[No. 8851. Department Two. September 27, 1910.]

**J. E. BURBANK *et al.*, Respondents, v. PIONEER MUTUAL
INSURANCE ASSOCIATION, Appellant.¹**

APPEAL—REVIEW—ERROR FAVORABLE TO APPELLANT. The appellant cannot complain of error in an instruction which was prejudicial only to the respondent.

INSURANCE—PROOFS OF LOSS—WAIVER. Proofs of loss by fire are waived by denying all liability for the loss.

SAME—AUTHORITY OF ADJUSTER—WAIVER OF PROOFS. An insurance adjuster authorized to adjust a fire loss has authority to waive proofs of loss required by the policy.

SAME—POLICY—CONDITIONS ON BACK. Conditions and stipulations printed on the back of a fire insurance policy and not mentioned or referred to on the face of the policy are not part of the policy or binding on the assured.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered November 20, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on a policy of fire insurance. Affirmed.

H. A. P. Meyers, for appellant.

J. T. Mulligan and *Martin & Wilson*, for respondents.

¹Reported in 110 Pac. 1005.

CROW, J.—J. E. Burbank and T. F. Graham, copartners as J. E. Burbank & Co., commenced this action upon a policy issued by Pioneer Mutual Insurance Association, a corporation, to recover loss sustained by fire. From a judgment in their favor, the defendant has appealed.

The appellant's controlling contention is that the trial court erred in denying its motion for judgment notwithstanding the verdict of the jury. On August 12, 1904, the appellant issued to the respondents an insurance policy which did not, upon its face, contain any stipulation requiring the assured to make any proofs of loss, nor did it make any reference to conditions which appear in fine print upon the back of the policy. The property insured was hay and grain located in a warehouse at Cheney, Spokane county, Washington.

There was evidence that, on April 7, 1905, the property was totally destroyed by fire; that appellant had a local agent, one Webb, then residing in Cheney, who, the day after the fire, called at appellant's branch office in Spokane and gave notice of the loss; that appellant directed one McKowen to adjust the loss, as its representative; that he visited Cheney about three weeks later, had a brief interview with the respondent Graham, who offered to give any information desired, and who permitted an inspection of all books belonging to the assured which had not been destroyed in the fire; that McKowen left Cheney without making any final adjustment or reporting to respondents; that he never returned; that respondents called on appellant's representative in charge of its branch office at Spokane, who referred them to McKowen as having complete charge of the adjustment of the loss; that they immediately called upon McKowen who, in substance, notified them that the company was not liable as they had sustained no loss; and that appellant's agent in charge of its Spokane office denied liability to respondents, who, without making further proofs, commenced this action.

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This evidence, although disputed, must, upon a motion for judgment, be accepted as true.

Appellant pleaded, as a part of the contract of insurance, certain printed matter upon the back thereof, which, in substance, required the respondents to make proofs of loss to appellant within sixty days after the fire, and furnish other information if demanded; and further stipulated that the making of such proofs of loss and the giving of such information should be a condition precedent to the right of the assured to maintain an action upon the policy. Appellant further alleged that no proofs of loss had been made by respondents; that by reason thereof their claim had never been adjusted; that no sufficient or satisfactory proof of the amount of their loss had ever been furnished by them or received by appellant; that the appellant had never refused to pay the loss, and that by reason of the plaintiffs' failure to furnish the required information and proofs, there is nothing due upon the cause of action pleaded herein. Upon the trial, the face of the policy above mentioned was offered in evidence by respondents. Thereafter the appellant offered in evidence certain conditions appearing in fine print upon the back of the policy, but to which it made no reference, and appellant now contends that the trial judge erred in rejecting such offer.

Appellant's contention is that it was the duty of respondents to make proofs of loss within sixty days after the fire as a condition precedent to a recovery herein; that they utterly failed to do so; and that, by reason of such failure, the motion for judgment should have been sustained. The respondents, while denying that the policy required them to make any proofs of loss whatever, contend that in any event the making of the same was waived by appellant. Although the trial judge excluded the printed matter which appeared on the back of the policy, he instructed the jury that it was necessary for the respondents to make proofs of loss, and furnish such information as the appellant might require, and

to do so within sixty days after the fire as a condition precedent to a recovery herein, unless the making and furnishing of such proofs and information had been waived by appellant. Under our construction of the policy, this instruction was erroneous and prejudicial as against the respondents. The error, however, was one of which the appellant cannot complain. The jury, by their verdict, necessarily found a waiver by appellant, and the evidence sustains their finding. The respondents could only be required to make proof of loss by the express terms of the contract of insurance. In any event, the evidence is sufficient to show that McKowen, the adjuster, by denying appellant's liability, waived the making of proofs of loss. Appellant's contention that McKowen had no such authority cannot be sustained. One who is intrusted by the insurer with apparent power to adjust the loss has authority to waive notice and proofs of loss. 19 Cyc. 859, and cases cited. This court, in *Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185, cited with approval *Ruthven v. American Fire Ins. Co.*, 102 Iowa 550, 71 N. W. 574, in which it was held that the direction to a party to adjust a loss included power to waive formal proof. The appellant admits that it authorized McKowen to adjust the loss. This being true, he had power to waive final proofs, as the jury undoubtedly found he did.

The policy was executed upon a printed form prepared by appellant, the terms of which must be liberally construed in favor of the assured. Conditions and stipulations indorsed upon the back of a policy, when sufficiently mentioned in the body of the instrument, will become a part of the contract of insurance itself, with the same force and effect as though they had been recited therein; but if no sufficient reference is made on the face of the policy to such indorsed conditions and stipulations, they cannot be regarded as a part of the contract, but must be ignored when the policy is being construed to ascertain obligations devolving upon the assured.

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"An indorsement on the back of a policy may be regarded as part of the contract, provided it is referred to in the policy as constituting part of it. If, however, there be no reference whatever to it in the policy, nothing to show that the parties meant it to be a part of the contract, it will be regarded merely as the act of the insurer, and not, therefore, binding on the insured. *Stone v. United States Casualty Co.*, 34 N. J. Law, 371; *Kingley v. New Eng. Mut. Fire Ins. Co.*, 8 Cushing 393; *Ferrer v. Home Mut. Ins. Co.*, 47 Vt. 416; *Farmers' Ins. & L. Co. v. Snyder*, 16 Wend. 481; *Bize v. Fletcher*, Doug. 291, note." *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236, 240, 7 Atl. 257.

In *Davis v. Northwestern Mut. Fire Ass'n*, 48 Wash. 50, 92 Pac. 881, this court held that the making of proofs of loss by an assured within the time required by the policy was a condition precedent to maintaining an action; but the policy in that case, upon its face, expressly stipulated that proofs of loss must be made to the company "within sixty days after the fire, unless such time is extended in writing by this company," and also that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing agreement, or unless commenced within twelve months next after the fire." In *Hunter Tract Imp. Co. v. Stone*, 58 Wash. 661, 109 Pac. 112, it was contended that the words, "This assignment is hereby accepted and approved," appearing upon the back of a contract of sale, but not referred to in the body thereof, should be regarded as a part of the agreement, and that written approval by the vendor became necessary to the validity of an assignment. Passing upon such contention, this court said: "The contract was completed, signed, and acknowledged by the parties, and this provision was not incorporated in that agreement, and the parties to the contract can in no way be bound by it." The same rule is applicable to the policy before us, which must be strictly con-

strued as against the insurer, and liberally construed in favor of the assured.

No requirement for proofs of loss to be made to the company by the assured appears on the face of this policy. Nor is there any reference to the printed matter, or to the by-laws of the company, which purport to make any such condition a part of the policy, or which require proofs of loss as a condition precedent to respondents' right to maintain this action. The respondents did not fail in the performance of any condition precedent required of them. They produced evidence sufficient to show the fire, the total destruction and value of the property insured, and to authorize a recovery in the amount awarded.

Other assignments of error relating to interest on the sum found to be due respondents, and to the retaxation of costs allowed for witness fees, are without merit. The appellant has been awarded a fair trial. The only judgment that could have been rendered upon the evidence, and the policy as construed by us, has been entered. We find no prejudicial error in the record. The judgment is affirmed.

RUDKIN, C. J., PARKER, MOUNT, and DUNBAR, JJ., concur.

[No. 8589. Department Two. October 1, 1910.]

REINHOLD HARRAS *et al.*, Respondents, v. GUS HARRAS *et al.*,
*Appellants.*¹

TRUSTS—CONSTRUCTIVE TRUST—ESTABLISHMENT—PAROL EVIDENCE—SUFFICIENCY. To establish a constructive trust by parol, in lands bid in at execution sale, the evidence must be clear, cogent, and convincing, and such a trust is sufficiently established where it appears that the purchaser at the request of a brother, to whom he was indebted, bid in the property, in which his brother had a present interest, at an execution sale for one-half its value, the brother being unable to attend the sale and refraining from securing the bidders, and his testimony being clearly supported by documents and undisputed circumstances and evidence of disinterested witnesses.

¹Reported in 110 Pac. 1085.

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Appeal from a judgment of the superior court for Walla Walla county, Edward C. Mills, Esq., judge *pro tempore*, entered September 23, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for specific performance and an accounting. Affirmed.

Herbert C. Bryson and T. P. & C. C. Gose, for appellants.
Dunphy, Evans & Garrecht, for respondents.

Crow, J.—This action was commenced by Reinhold Harras and P. N. Hansen against Gus Harras and Anna Harras, his wife, to compel the conveyance of certain land which they allege was held in trust for them by the defendant Gus Harras, and to obtain an accounting. From a decree in their favor, the defendants have appealed.

The trial court in substance found, that between February 23, 1906, and January 18, 1909, the Garden City Packing Company, a corporation, was the owner of, and in the possession of, the land in controversy; that Reinhold Harras was president and general manager of, and the principal stockholder in, the corporation; that upon May 7, 1907, the John Morrell Company, Ltd., a corporation, obtained a judgment against the Garden City Packing Company in the sum of \$140.33; that upon July 27, 1907, the land was sold upon execution to satisfy said judgment; that upon June 10, 1907, the First National Bank of Pendleton obtained a judgment against the Garden City Packing Company in the sum of \$1,716.41, costs and interest; that upon March 28, 1908, the land was again sold upon execution to satisfy said judgment; that immediately prior to the sale last mentioned Reinhold Harras, by long-distance telephone, requested the defendant Gus Harras, his brother, to purchase the land for the use and benefit of the judgment debtor, the Garden City Packing Company; that Reinhold Harras was then in Pendleton, Oregon, and unable to reach Walla Walla in time to

attend the sale; that Gus Harras agreed to buy the land as requested; that Reinhold Harras, relying on his agreement, desisted from further efforts to find a bidder; that an unsettled account then existed between the brothers Reinhold and Gus; that Gus bid the property in for much less than its actual value; that for many years and until September, 1908, the brothers had a continuous course of dealing with each other, being partners a portion of the time; that Reinhold had also been an agent for Gus a portion of the time; that at the time of the execution sale an involved, complicated, and unsettled account existed between them; that under the instruction of Reinhold, and as trustee for the company, Gus bid in and purchased the property at the execution sale on March 28, 1908; that thereafter he obtained an assignment of the certificate of sale issued on June 27, 1907, when the property was sold to satisfy the John Morrell Company, Ltd., judgment; that upon January 18, 1909, the Garden City Packing Company, for value, sold and transferred its interest to the respondents, Reinhold Harras and P. N. Hansen; that upon July 27, 1907, and at all times since, the Garden City Packing Company and its grantees were, or had been, in possession of the land, exercising dominion and control; that there is a deficiency due Gus Harras upon a judgment against Reinhold, obtained since the commencement of this action upon a separate and distinct transaction aside from any of their running accounts; that by reason of unadjusted running accounts existing prior to the commencement of this action there was due Gus Harras \$412.80 at the time of the trial; that in addition thereto there was due him \$1,897.56 advanced in purchasing the property at execution sale, \$150 for purchase of the prior certificate of sale, \$129.45 and \$56.87 for tax liens discharged and taxes paid, amounting in all to \$2,646.68; and that respondents are entitled to an offset against said amount in the sum of \$2,225 due them from Gus Harras, leaving the sum of \$421.68 still remaining due to Gus from the respondents.

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The evidence shows that, at the time Gus agreed to purchase the lands for the use and benefit of the Garden City Packing Company, respondents' assignor, he was indebted to the respondent Reinhold Harras in the sum of \$2,225, purchase money for fixtures in a certain meat market in Pendleton, Oregon, sold to him by Reinhold, an item not included in any of the running accounts; that thereafter the Garden City Packing Company, respondents' assignor, became indebted to Gus for the purchase money paid for the land, the former certificate of sale, tax liens, and other expenses, in a sum sufficient to create a net balance of \$421.68, independent of the deficiency judgment in favor of Gus, and that Reinhold Harras and P. N. Hansen had succeeded to all the rights of Reinhold and of the Garden City Packing Company. A decree was entered protecting Gus Harras by liens upon the land in the sums found due him, directing a conveyance to respondents subject to such liens, which the respondents were ordered to pay, and awarding the appellant Gus Harras an execution and order of sale in the event of respondents' failure to make such payments.

The findings and decree were vigorously assailed by the appellants, who contend that they are not sustained by the evidence. The record is lengthy. The evidence cannot be stated in detail, but we have carefully considered and weighed it with the result that we conclude the findings of the trial judge must be sustained. From the long and continuous course of dealing which existed between the two brothers, it is manifest that their relations were of a highly confidential character. Reinhold, as president, manager, and principal stockholder of the corporation, had a present and personal interest in the land which it owned. From the evidence we find that the land with the improvements thereon was worth \$5,000 or more. Reinhold, being unable to attend the sale, requested Gus, then his debtor, to bid it in for the company. At the time, and independent of their running accounts, we find from the evidence that Gus was indebted to him in the

sum of \$2,225 for the purchase price of fixtures in the Pendleton meat market sold to him. Reinhold, after telephoning Gus, made no further efforts to obtain a bidder, but relied upon his oral promise. Another party attended the sale at Reinhold's request but, after conferring with Gus, made no bid. The corporation and the respondents have since been in continuous possession in person or by tenant, and made valuable improvements at their own expense. Gus paid much less than half of its value for the land, and now claims ownership. The purpose of this action is to establish a trust and secure a conveyance. The evidence offered to show the trust rests in parol.

"In no case will a constructive trust be decreed on account of the breach of an alleged verbal agreement of the purchaser at a judicial sale to purchase for the benefit of the judgment debtor, unless the evidence to prove the agreement is clear and satisfactory." 15 Am. & Eng. Ency. Law (2d ed.), 1191.

In *Denny v. Holden*, 55 Wash. 22, 103 Pac. 1109, recognizing the rule above stated, we said:

"The appellant seeks to establish a resulting trust by parol evidence, to show that the respondents, the owners of the legal title to the property in controversy, hold title to the extent of an undivided one-half interest in trust for him. In such case the evidence must be clear, cogent, and convincing before a trust will be declared. 3 Pomeroy, Eq. Jur. (3d ed.), 1040; 15 Am. & Eng. Ency. Law (2d ed.), p. 1174; *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027; *Chambers v. Emery*, 13 Utah 374, 45 Pac. 192; *Rice v. Rigley*, 7 Idaho 115, 61 Pac. 290. The following case also illustrates this view: *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931."

If to sustain the alleged trust herein it were necessary for us to rely upon the unsupported statements of the respondent Reinhold Harras, which are vigorously disputed by the evidence of Gus Harras, we might not approve the findings of the trial judge. The credibility of Reinhold Harras has been bitterly assailed, but we think his evidence, in so far as it has been accepted by the trial judge, is so clearly sup-

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ported and fortified by documents, undisputed circumstances, and the evidence of disinterested witnesses, that the quantum of proof required by the rule above stated appears in the record.

On the law there is no material dispute. The authorities generally hold that, where one person verbally agrees to attend a judicial sale and purchase for the benefit of another who has a present interest in the land to be sold, the promisor will not be permitted to perpetrate a fraud by repudiating his agreement, but will be held a constructive trustee. The courts, with much unanimity, hold that a constructive trust will arise, and the promisor who buys the land at judicial sale will be decreed to hold the same for the benefit of the promisee, where there existed between them a confidential relation aside from that created by the agreement to purchase, where the promisee supplied a part of the purchase money, where the promisee was lulled into inactivity by reason of the promise and was prevented from protecting his rights in the land sold or refrained from doing so, where the promisor was enabled, by reason of his agreement, to secure the land at a price materially below its actual value, or where persons interested in the land under the oral agreement remained in possession thereof and made valuable improvements. All of these conditions are shown to have prevailed in the case at bar, and we regard them as sufficient to sustain the trust declared by the trial court. The appellants themselves, in their opening brief, making citations of authority, well state the law in the following language:

"Circumstances may arise out of the verbal agreement which will make it inequitable or fraudulent for the promisor to refuse to perform the agreement, and in such case a constructive trust will be created. Some of the following conditions and circumstances must be present for a constructive or resulting trust to arise. 1st. Where prospective bidders at a judicial sale, believing that the promisor in the oral agreement was buying for the promisee whose land was being sold to satisfy debts against him, refrained from bidding. *Collins*

v. Williamson, 94 Ga. 635, 21 S. E. 140; *Vanbever v. Vanbever*, 97 Ky. 344, 30 S. W. 988; *Leahey v. Witte*, 123 Mo. 207, 27 S. W. 402; *Phillips v. Hardenburg*, 181 Mo. 468, 80 S. W. 891; *Carter v. Gibson*, 29 Neb. 324, 45 N. W. 634, 26 Am. St. 381; *Woodfin v. Marks*, 104 Tenn. 512, 58 S. W. 227. 2d. Where the promisee in the oral agreement refrained from bidding on account of the agreement. *Berlien v. Bieler*, 96 Mo. 491, 9 S. W. 916; *Boynnton v. Housler*, 73 Pa. St. 453; *Kennedy v. McCloskey*, 170 Pa. 354, 33 Atl. 117; *Shallcross v. Mawhinny* (Pa.), 7 Atl. 734; *Cutler v. Babcock*, 81 Wis. 195, 51 N. W. 420, 29 Am. St. 882; *Bryan v. Douds*, 213 Pa. St. 221, 62 Atl. 828, 110 Am. St. 544; 5 Am. & Eng. Ann. Cases, 172. 3d. Where the promisee relaxes his efforts to save the property from being sold at judicial sale. *Arnold v. Cord*, 16 Ind. 177. 4th. Where the promisee relaxed his efforts to prevent a sale at a sacrifice. *Leahey v. Witte*, *supra*. 5th. Where the promisee supplied part of the purchase money. *Wright v. Gay*, 101 Ill. 233; *Barnet v. Dougherty*, 32 Pa. St. 371. 6th. Or where the promisor in the oral agreement bought in the property at a price greatly below its value. *Phillips v. Hardenburg*, *supra*; *Dickson v. Stewart*, 71 Neb. 424, 98 N. W. 1085, 115 Am. St. 596; *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *Shallcross v. Mawhinny*, *supra*; *Hebron v. Kelly*, 75 Miss. 74, 21 South. 799. 7th. Where the promisor and the promisee in the oral agreement sustained a close confidential relation with each other such as parent and child. *Pope v. Dapray*, 176 Ill. 478, 52 N. E. 58; or attorney and client. See *Holmes v. Holmes*, 106 Ga. 858, 33 S. E. 216. And if we are permitted to comment on the extreme case of mother-in-law and son-in-law, has been held such confidential relation in Kentucky in the case of *Stubbins' Adm'r v. Briggs*, 24 Ky. Law 230, 68 S. W. 392; and further, a confidential relation in the case of cotenants has been held in the case of *Manning v. Hayden*, 5 Sawyer 360, Fed. Cas. No. 9,043; *Allen v. Arkenburgh*, 2 App. Div. 452, 37 N. Y. Supp. 1032; *Peck v. Peck*, 110 N. Y. 64, 17 N. E. 383. For a full treatise, see *Bryan v. Douds*, *supra*, and extended note."

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and MOUNT, JJ., concur.

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[No. 8823. Department One. October 3, 1910.]

MURDOCK CAMPBELL, *Appellant*, v. E. N. JONES *et al.*,
Respondents.¹

MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTORS—“FORCE ACCOUNT.” Subcontractors on railroad construction who worked under a “force account” or agreement to furnish the tools, appliances, and men at actual cost, plus a fixed percentage as their profit, are independent contractors, and the relation of master and servant does not obtain between their servants and the railroad company.

MASTER AND SERVANT—SAFE PLACE—ACT OF FOREMAN—FELLOW SERVANTS. Railroad contractors are liable to an employee, engaged on a steep hillside, for an injury sustained through the negligent act of their foreman in kicking a stump loose above the working place, causing a rock to roll down the hill; since they owed the non-delegable duty of furnishing a safe place to work and of keeping it safe; and it is immaterial that the act of kicking the stump loose was that of a fellow servant, since the foreman's duty of superintendence was a continuous one.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 29, 1910, dismissing at the close of plaintiff's case an action for personal injuries sustained by an employee in railroad construction through the fall of a rock. Affirmed in part and reversed in part.

Plummer & Latimer, for appellant.

H. H. Field and Cullen & Dudley, for respondent Chicago, Milwaukee & Puget Sound Railway Company.

FULLERTON, J.—The appellant brought this action against the respondents to recover for personal injuries. On the trial, at the close of his case in chief, a challenge to the sufficiency of his evidence was interposed by the respondents and sustained by the court, and afterwards a judgment was

¹Reported in 110 Pac. 1083.

entered against him to the effect that he take nothing by his action. This appeal followed.

From the record it appears that, at the time the appellant received the injuries for which he sues, the respondent Chicago, Milwaukee & Puget Sound Railway Company was engaged in constructing a railroad across the state of Washington, and had let the contract for the construction of its roadbed to a firm of contractors known as Grant Smith & Company, who in turn had sublet the work of constructing a portion thereof to the respondents Jones & Onserud. Between the terminals of the work undertaken by Jones & Onserud, or contiguous thereto, was certain bridge work which was not included within the work undertaken by them, but which nevertheless required certain grading and excavating to be done preparatory to the erection of the bridge. The contractors Jones & Onserud undertook to do this work under what a witness called a "force account;" that is, as the witness explains, Jones & Onserud undertook to furnish all the necessary labor, materials, and tools and do the necessary grading and excavating, for the actual cost of the work, plus a fixed percentage to be added thereto as profit.

The appellant was employed by Jones & Onserud, and was put to work with some three or four others on the force account work, excavating for a bridge pier under the direction of one A. E. Lundin, foreman for Jones & Onserud. The place of work was on a steep hillside, so steep, in fact, that, before paths and steps were cut into the face of the hill, the workmen were let down to their place of work with ropes. A part of the work consisted in drilling holes into the bank with churn drills. The weather being cold, clay and earth would freeze to the drills, rendering them useless, and to clean them they were heated in a small fire which was kept burning for that purpose at the place of work. To get fuel for this fire the foreman, Lundin, went up the hill some one hundred and fifty feet above the fire, and proceeded to uproot a small stump that stood at that place, by kicking it with his foot.

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In so doing he loosened a rock some twelve inches in diameter, which rolled down the hill and struck appellant, causing the injuries for which he sues. The record does not show that the railway company was in any manner concerned in the employment of the appellant. It did not hire him directly, nor did it attempt in any manner to direct or control his work while he was engaged in excavating for the pier. Its contract was with Jones & Onserud. It employed that firm to do the work, leaving them to perform it according to their own methods, and with their own tools, materials, and employees, subject to the one condition that certain defined results be obtained.

Such being the record, we think the trial judge very properly sustained the challenge to the sufficiency of the evidence made by the respondent railway company. Jones & Onserud, the employers of the appellant, sustained to that company the relation of independent contractors, and their negligence or the negligence of their foreman, whereby one of their employees was injured, could not render the railway company liable for such injury. *Easter v. Hall*, 12 Wash. 160, 40 Pac. 728; *Boyle v. Great Northern R. Co.*, 13 Wash. 383, 43 Pac. 344; *Ziebell v. Eclipse Lumber Co.*, 33 Wash. 591, 74 Pac. 680; *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089, 1 L. R. A. (N. S.) 283; *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136; *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294, 111 Am. St. 904; *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310; *Seattle Lighting Co. v. Hawley*, 54 Wash. 137, 103 Pac. 6.

But we think the court erred in sustaining the challenge to the evidence made on behalf of the defendants Jones & Onserud. They were the appellant's employers, and owed to him the duty of furnishing him with a reasonably safe place in which to work, and the duty of keeping the place reasonably safe as long as they required him to work therein. This duty was nondelegable, and when they intrusted it to another, they became responsible for the negligent perform-

ance of the duty by that other. If, therefore, Lundin, in uprooting the stump, acted negligently, and the place of work which had been furnished the appellant was thereby rendered dangerous or unsafe, there can be no question of the liability of his principals therefor. His negligence was their negligence, and any negligent act in the line of his duty which would render him personally responsible to the appellant would render his principals likewise personally responsible. The liability of the respondents Jones & Onserud, therefore, turns on the question whether the act of uprooting the stump was in itself negligent. But as to this we think the evidence made a case for the jury. The position of the stump with reference to the working place of the appellant, the manner in which it was uprooted, the frozen condition of the ground, and the fact that the act did in fact loosen a rock which rolled down the hill and injured the appellant, were all matters to be considered by the jury in determining the character of the act, and the court should have submitted the question of negligence to them.

We are aware of the contention of the respondents, to the effect that Lundin when he uprooted the stump was not engaged in the master's work, but was performing the labor of a servant; that he was at that time a fellow servant, and his acts being those of a fellow servant would not render the master liable for injuries resulting therefrom, even though it were considered that the acts were negligent. But this reasoning overlooks the fact that the duty of the respondents to oversee the appellant's place of work was a continuing duty, obligatory upon them at all times; that while the work itself may have been servant's work, the duty to see that its performance did not result in injury to the servants working elsewhere was the master's duty. This duty, as we say, could not be delegated, and if the injury to appellant was caused by its negligent performance, the master is liable. This principle was announced by this court in the case of *Creamer v. Moran Bros. Co.*, 41 Wash. 636, 84 Pac. 592. There cer-

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tain employees of the appellant were engaged, under the direction of a foreman, in removing a propeller from a propeller shaft of a ship to which it was tightly wedged. The hub of the propeller had been heated to facilitate its removal, and oil confined therein had by that means become intensely hot. In the course of the work, the foreman took up a sledge and struck the hub a blow which loosened it, releasing the hot oil, which poured upon an employee assisting in the work, and burned him so severely as to cause his death. It was held that the act of the foreman was the act of the master, and not that of a fellow servant. In the course of its opinion, the court said.

"It is urged by appellant that the act of the superintendent in striking the hub with the sledge at the time and in the manner in which he did, constituted an act of a fellow servant of Creamer; that such an act, although performed by the superintendent, was not one of superintendence, was not one of the nondelegable duties of the master, was not the act of a vice principal; but was the manual act of one working with Creamer in the same undertaking and to accomplish the same end toward which they were all working; that in striking said blow said superintendent was, for the time being, a fellow workman of Creamer, and that his negligence as such would not render the appellant company liable. This argument would appeal strongly to the writer of this opinion were it not for the former decisions of this court. *Nelson v. Willey Steamship etc. Co.*, 26 Wash. 548, 67 Pac. 237; *Dossett v. St. Paul etc. Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114. Under the authority of those decisions, when the superintendent, without the knowledge of the workman, negligently set in operation an agency fraught with danger, he thereby rendered the company liable for the result of such negligence."

We are of the opinion, therefore, that, on any view of the case, the judgment is erroneous as to the respondents Jones & Onserud. As to them the judgment will be reversed, and the cause remanded with instructions to grant a new trial. As

to the Chicago, Milwaukee & Puget Sound Railway Company, it will stand affirmed.

RUDKIN, C. J., GOSE, and CHADWICK, JJ., concur.

[No. 8509. Department One. October 4, 1910.]

WILLIAM M. McKIM, *Appellant*, v. ANDREW R. PORTER *et al.*,
Respondents.¹

JUDGMENT—BAR—DIRECTION OF VERDICT—FORM—CONCLUSIVENESS. A judgment reciting that the defendant challenged the legal sufficiency of the evidence and moved the court to decide, as a matter of law, that the defendants were entitled to a verdict in their favor, and that the jury be discharged and judgment entered in favor of the defendants upon the ground that the plaintiff failed to prove a sufficient cause for the jury and granting the motion in all things, is a judgment on the merits and a bar to another action, under Rem. & Bal. Code, § 340, requiring the court to decide, as a matter of law, what verdict shall be found, etc.; and not a judgment of nonsuit, under Id., § 408, for plaintiff's failure "to prove a sufficient cause for the jury" (RUDKIN, C. J., and GOSE, J., dissenting).

Appeal from an order of the superior court for Spokane county, Webster, J., entered October 28, 1909, in favor of the defendants, upon withdrawing the case from the consideration of the jury after a challenge to the sufficiency of the evidence. Affirmed.

Edwin E. Heckbert and Belden & Losey, for appellant.

E. C. Macdonald and H. M. Stephens, for respondents.

MORRIS, J.—The only question submitted on this appeal is the character of the following judgment, whether it be one of nonsuit, or upon the merits and a bar to a subsequent action:

"This cause came regularly on for trial before the court and a jury on the 3d day of June, A. D. 1907, the plaintiff appearing in person and by counsel and the defendants ap-

¹Reported in 110 Pac. 1073.

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pearing by their counsel. The plaintiff introduced his evidence and rested, whereupon the defendants challenged the legal sufficiency of the evidence and moved the court to decide, as a matter of law, that the defendants were and are entitled to a verdict in their favor, and that the jury be discharged from further consideration of the case, and that judgment be entered in favor of the defendants, that plaintiff take nothing herein upon the ground that the plaintiff failed to prove a sufficient cause for the jury.

"The court having considered said motion and being fully advised in the premises does hereby in all things grant said motion, and it is hereby ordered and adjudged that the plaintiff take nothing herein, and that the defendants recover their costs and disbursements to be taxed by the clerk.

"Done in open court this 6th day of June, A. D. 1907.

"Wm. A. Huneke, Judge."

The motion upon which the judgment was entered does not appear of record, except as it is contained in the judgment itself. As so contained, we are of the opinion that it was not a motion for a nonsuit, as contended for by appellant, but rather a challenge to the sufficiency of the evidence, and required the court to decide, as a matter of law, what verdict should be found. Appellant contends that the judgment follows Rem. & Bal. Code, § 408, reading:

"An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

"8. By the court upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient cause for the jury."

The motion, however, as embodied in the judgment, went much farther than to ask the court to rule that plaintiff had failed to prove a sufficient cause for the jury. It not only called the insufficiency of the evidence to the court's attention, but "moved the court to decide as a matter of law that the defendants were and are entitled to a verdict in their favor, and that the jury be discharged from further consideration of the case and that judgment be entered in favor of defendants." The court, under this motion, was called upon to rule

not only that "plaintiff had failed to prove a sufficient cause for the jury," as provided for in § 408, *supra*, and is in effect a negative finding, but the motion called upon the court to go farther and hold that the evidence affirmatively showed that defendants were entitled to judgment and that the verdict should be in their favor. The motion was manifestly made under Rem. & Bal. Code, § 340, providing that,

"In all cases tried in the superior court with a jury in which the legal sufficiency of the evidence shall be challenged, and the court shall decide as a matter of law what verdict should be found, the court shall thereupon discharge the jury from further consideration of the case, and direct judgment to be entered in accordance with its decision."

We have, without exception, held that judgments granted under this section are judgments upon the merits. *Spokane & Idaho Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119; *Bartelt v. Seehorn*, 25 Wash. 261, 65 Pac. 185; *Weir v. Seattle Elec. Co.*, 41 Wash. 657, 84 Pac. 597; *Sweeney v. Waterhouse & Co.*, 43 Wash. 613, 86 Pac. 946; *Morris v. Warwick*, 42 Wash. 480, 85 Pac. 42; *McGuire v. Bryant Lumber & Shingle Mill Co.*, 53 Wash. 425, 102 Pac. 237.

As stated in *Morris v. Warwick*, *supra*, this section, in referring to the sufficiency of the evidence, characterizes it as "the legal sufficiency," while in § 408, reference is made to the probative sufficiency of the evidence. If the evidence does not prove the plaintiff's case, it is a case for a nonsuit, but if the case as alleged is established but its legal sufficiency is denied by the court, the judgment rendered upon such a denial is under § 340 and is a bar.

There were two affirmative defenses pleaded, and it may have been that, in the judgment of the court, one or both of these defenses were established by plaintiff's evidence, as in *Bartelt v. Seehorn*, *supra*. Such a ruling would in no sense be one of nonsuit, but would be a finding upon the merits.

Appellant cites *Bartelt v. Seehorn*, *supra*, in saying, "A

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judgment of nonsuit or of dismissal entered by the trial court on motion of the defendants when the plaintiff fails to prove a sufficient cause for the jury is not a bar." Such undoubtedly is the rule, but there is a wide distinction between a dismissal granted because of failure of proof, and a dismissal and judgment granted because the court holds defendant entitled to a judgment on the merits upon the plaintiff's evidence. The judgment before us is of the latter kind, from its own recitals. Appellant also cites and relies upon *Carroll v. Grande Ronde Elec. Co.*, 49 Ore. 477, 90 Pac. 903, but the statute construed in that case is similar to Rem. & Bal. Code, § 408, and any dismissal thereunder could not be other than one of nonsuit.

We are of the opinion that the judgment is one upon the merits, and is a bar to any subsequent action upon the same cause. The judgment of the lower court is therefore affirmed.

FULLERTON, J., concurs.

CHADWICK, J. (concurring).—The object of the statute of 1895 (Rem. & Bal. Code, § 340), was to make a demurrer to the evidence effective, and a judgment rendered thereon a judgment on the merits. There is much reason to sustain the statute. If the plaintiff has submitted all his facts and a court would be bound to set the verdict aside or to grant a new trial in case a verdict was rendered, it should have, and by this statute is given, the power of ordering a judgment, rather than going through the useless form of directing a verdict with its consequent detail and formality. The party is not without remedy. He may appeal as from any other judgment on the merits. The proceeding is not a novel one. At common law and under the statutes a demurrer to the complaint, if sustained, warrants a judgment on the merits. So a motion for a judgment upon an opening statement, or a judgment upon the pleadings, or a motion for judgment when all the evidence is in, is sustained as a judgment upon the merits.

In Montana and Nevada, statutes similar to our own are to be found. Our statute, § 408, Rem. & Bal. Code, is the same as § 3246, Compiled Laws of Nevada, with the exception that it is there provided that, if the case is dismissed under the first two subdivisions of the statute, it will operate as a judgment of nonsuit; but in every other case, including the ground that the plaintiff has failed to make out his case, the judgment shall be on the merits. The statute of 1895 goes no further than this. Nor is a court robbed of its discretion, in my judgment, to grant a judgment of nonsuit strictly by the interposition of a motion for judgment. If it appears to the court that the failure of the plaintiff results because of the mistaken jurisdiction of the court, or for mere lack of proof that may be supplied in a subsequent action, it is within the power of the court to direct a judgment, not upon the merits, but of nonsuit. The statute says that the court shall direct a judgment "in accordance with its decision." On the other hand, if it appears that the plaintiff has made his whole case and that a different case could not be made upon a new trial, and in the judgment of the court the testimony is insufficient to sustain a verdict and judgment, the court should enter a judgment upon the merits, leaving the party to his appeal. This construction gives effect to both statutes, and insures their harmony. The Oregon case, as is said by Judge Morris, is in line with the general rule, but can have no application here because of our local statute. Reference to the case of *Wilcox v. Parker*, 120 U. S. 89, cited in the Oregon case, will show that, under the Nevada statute, a judgment such as the one we have before us was sustained as a judgment on the merits, the court holding that the Nevada statute worked an exception to the general rule.

I concur in the foregoing opinion.

RUDKIN, C. J. (dissenting).—I dissent. Section 408, Rem. & Bal. Code, provides that, "An action may be dismissed, or a judgment of nonsuit entered in the following cases: . . .

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8. By the court upon motion of the defendant, when upon the trial, the plaintiff fails to prove a sufficient cause for the jury." Section 410, Id., provides that "When a judgment of nonsuit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause." Section 340, Id., enacted in 1895, provides that "In cases tried in the superior court with a jury in which the legal sufficiency of the evidence shall be challenged, and the court shall decide as a matter of law what verdict should be found, the court shall thereupon discharge the jury from further consideration of the case and direct judgment to be entered in accordance with its decision." These two enactments cover entirely different fields and should not be confounded.

Prior to the enactment of § 340, *supra*, if a dismissal or nonsuit was granted, on motion of the defendant, for failure of the plaintiff to prove a sufficient cause for the jury, the jury was discharged, and a judgment of dismissal or nonsuit followed. No verdict was directed or found. If, on the other hand, the court decided on the trial of an action on the merits that the plaintiff or the defendant was entitled to a verdict as a matter of law, it directed the jury to find and return a verdict in accordance with its decision, upon which a final judgment was entered. The sole purpose of the act of 1895 was to dispense with the necessity of compelling trial judges to direct juries to find and return verdicts, which might, or might not, meet their approval, and the later act in no manner conflicts with the preexisting law relating to involuntary nonsuits, or to the effect of such judgments as a bar to another action for the same cause.

But, as I understand the majority opinion, the act of 1895 entirely supersedes the act relating to involuntary nonsuits and their effect. There are two reasons why this view should not be adopted. First, because repeals by implication are not favored; and second, because there is no real conflict between the two acts. The act of 1895 has no reference what-

ever to involuntary nonsuits, or to judgments entered at the close of plaintiff's testimony. It provides that, when the legal sufficiency of the evidence is challenged, and the court shall decide as a matter of law what verdict shall be found, etc. No verdict was ever found on motion for a nonsuit under any system of practice with which I am familiar, and the court is not called upon, by such a motion, to decide what verdict should be found. The very object of the motion is to prevent the finding of a verdict or a judgment on the merits.

In discussing the difference between a judgment of nonsuit and a judgment directed under the act of 1895, in *Weir v. Seattle Elec. Co.*, 41 Wash. 657, 84 Pac. 597, we said: "The only substantial difference between the two judgments is, that the former is *res adjudicata*, while the latter is not, unless based upon some affirmative finding." In *Fisk v. Tacoma Smelting Co.*, 49 Wash. 514, 95 Pac. 1082, speaking of the statute relating to nonsuits, we said: "It will be seen at a glance that the terms of the statute are so certain and definite as to preclude construction." I still adhere to these views. The effect of a judgment of nonsuit under a similar statute was considered by the supreme court of Oregon in *Carroll v. Grande Ronde Elec. Co.*, 49 Ore. 477, 90 Pac. 903, and after a full review of the authorities, the court reached the conclusion that a judgment of nonsuit is not a bar to another action for the same cause, regardless of its form. The court there criticised the decision of this court in *Bartelt v. Seehorn*, 25 Wash. 261, 65 Pac. 185, where it was held that a judgment of nonsuit in a personal injury case was a bar to another action for the same cause, when the judgment recited that the nonsuit was granted because of contributory negligence on the part of the plaintiff. But that question is not involved here, and on the general question as to the effect of a nonsuit, the Oregon case is amply supported by authority. In fact there are none to the contrary. Nor is the form of the judgment material, so long as it contains no affirmative adjudication. Freeman, Judgments, § 260. Our

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own practice is in harmony with these views. How often has it been assigned as error that the court denied a motion for a nonsuit at the close of plaintiff's case, and a motion for a directed judgment at the close of all the evidence? It may be argued that there is no reason why a plaintiff should be permitted to commence a new action for the same cause, after the court has once decided that his testimony is not sufficient to warrant a recovery; but such has always been the law, and argument in favor of a change should be addressed to the legislature and not to the courts.

GOSE, J., concurs with RUDKIN, C. J.

ON REHEARING.

[*En Banc.* March 22, 1911.]

PER CURIAM.—Upon a reargument of this case *en banc*, the judgment will be affirmed for reasons assigned in the former opinion.

[No. 8784. Department Two. October 10, 1910.]

THE STATE OF WASHINGTON, *Appellant*, v. SAMUEL WRIGHT,
Respondent.¹

CRIMINAL LAW—APPEAL—JURISDICTION. Jurisdiction of a criminal appeal cannot be conferred on the supreme court by agreement, where the statute confers no jurisdiction.

CRIMINAL LAW—APPEAL—BY STATE—RIGHT TO APPEAL. The state cannot appeal from a judgment in a criminal case directing an acquittal on the ground of the insufficiency of the evidence, under Rem. & Bal. Code, § 1716, subd. 7, limiting appeals by the state to cases wherein the indictment or information is set aside or found insufficient or the error does not affect the merits.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered March 18, 1910, upon a verdict of not guilty rendered by direction of the court, in a prosecution for opening a saloon on Sunday. Dismissed.

¹Reported in 111 Pac. 18.

Augustus Brawley, for appellant.

M. P. Hurd, for respondent.

PER CURIAM.—This was a prosecution for the violation of Rem. & Bal. Code, § 2494, which provides, among other things, that every person who, on the first day of the week, shall open any drinking saloon shall be guilty of a misdemeanor. At the close of the testimony, the court directed the jury to return a verdict of not guilty, which was accordingly done, and from this ruling or decision, the state has attempted to prosecute an appeal. The prosecuting attorney for the county and the respondent have stipulated that the appeal may be submitted without argument on the brief filed by the appellant, and no objection to the jurisdiction of this court is suggested or raised. However, if we are without jurisdiction, it is the plain duty of the court to raise the objection and to dismiss the appeal. Rem. & Bal. Code, § 1716, subd. 7, provides that no appeal shall be allowed to the state in any criminal action except where the error complained of is in setting aside the indictment or information, or in arresting the judgment on the ground that the facts stated in the indictment or information do not constitute a crime, or is some material error in law not affecting the acquittal of a prisoner on the merits. That an acquittal directed by the court on the trial of a criminal action, on the ground that the evidence is insufficient to sustain a conviction, is an acquittal on the merits is practically conceded by the appellant, and is fully sustained by the decisions of this court. *Territory v. Lee*, 3 Wash. Ter. 396, 17 Pac. 884; *State v. Kemp*, 5 Wash. 212, 31 Pac. 711; *State v. Hubbell*, 18 Wash. 482, 51 Pac. 1039; *State v. Heron*, 19 Wash. 706, 53 Pac. 348; *State v. Murrey*, 30 Wash. 383, 70 Pac. 971.

The appeal is therefore dismissed.

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[No. 8796. Department Two. October 10, 1910.]

THE STATE OF WASHINGTON, *on the Relation of* NORBERT R.
SYLVESTER *et al.*, Plaintiff, v. THE SUPERIOR COURT
FOR BENTON COUNTY, *Respondent*.¹

RAILROADS—FRANCHISES—FORFEITURE—MUNICIPAL CORPORATIONS—ORDINANCES. A railroad franchise in city streets, granted by ordinance, may be forfeited by a resolution of the city council, in the absence of statutory or charter provisions requiring the forfeiture to be by ordinance.

EMINENT DOMAIN—USE OF CITY STREETS—FRANCHISE—CONDITION PRECEDENT. A railroad company cannot condemn an abutter's interest in a city street in which it seeks to lay its railway tracks without first obtaining a franchise from the city giving it the right to the use of the streets.

SAME—RIGHTS OF ABUTTERS. An abutter upon a street, whose interests are being condemned by a railroad company seeking to use the street for railroad purposes, after its franchise therefor has been forfeited by the city council, has such an interest in abating the public nuisance in the street as to entitle it to raise the point in the condemnation proceeding that the company has no franchise to use the street.

Certiorari to review an order of the superior court for Benton county, Holcomb, J., entered April 6, 1910, adjudging a public use in condemnation proceedings, after a hearing before the court. Reversed.

Moulton & Henderson (B. S. Grosscup and Cain & Hurspool, of counsel), for relators.

Danson & Williams and *Linn & Boyle*, for respondent.

Crow, J.—The North Coast Railroad Company, a public service corporation, commenced proceedings in the superior court of Benton county to condemn the interests of Norbert R. Sylvester and Margaret M. Rankans in the north thirty feet of Front street, in Kennewick, Washington. The trial judge entered an order adjudging a public necessity and use.

¹Reported in 111 Pac. 19.

The defendants applied to this court for a writ of certiorari, which has been issued, and the order is now before us for review.

The evidence shows that, on January 3, 1907, the town of Kennewick, by Ordinance No. 45, granted the respondent railroad company permission to lay its tracks for its main line over the north thirty feet of Front street, upon which street the relators' lots abut; that sections 11 and 14 of the ordinance read as follows:

"Section 11. The grantee, its successors and assigns, is hereby required to commence the construction of said railroad within 30 days from the date of the publication of this ordinance in the official newspaper of the town of Kennewick, and shall carry on the operation of such construction to as speedy completion as the nature of the work shall permit and complete said road and run and operate trains upon same through the town of Kennewick, between North Yakima and the Columbia river, in the state of Washington, within fifteen months, and bridge the Columbia river east of the town of Kennewick within 30 months thereafter."

"Section 14. The grantee shall file a written acceptance of this ordinance with the town clerk of the town of Kennewick, within thirty days after the publication of said ordinance in the official newspaper of the town of Kennewick;"

that the ordinance was published on January 11, 1907; that written acceptance was not filed by the respondent within thirty days after its publication, but that an acceptance, not shown to have been filed, was prepared by respondent on February 19, 1907; that on August 2, 1909, the town council of Kennewick, in regular session, adopted a resolution declaring that the North Coast Railroad Company had forfeited its right or franchise to occupy the street; that no construction work was commenced on Front street by respondent prior to February 26, 1910, on which date the respondent, after dark on Saturday evening, entered upon the street and commenced laying its tracks; that respondent was stopped by injunction proceedings; that later, upon suspension of the injunction, one track was completed, and that

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this proceeding was commenced on March 8, 1910, to condemn such interests or property rights as the relators hold in the street upon which their lots abutted, and to compensate them for such damages as they might sustain. Other facts not material to be now mentioned were also shown, in regard to another main line through Kennewick adopted by respondent, and an alleged abandonment of the franchise above mentioned.

Some contention is made by the relators to the effect that the franchise ordinance was not passed in the manner required by law, but we will not consider that question, our view being that a forfeiture has been declared by the town council.

"Before a railroad company can lawfully occupy a street, it must have authority to do so from the legislature, or from some municipal corporation having power to grant it. A railroad cannot occupy a street under its general authority to make a location, but such right must be expressly granted or necessarily implied." 1 Lewis, Eminent Domain (3d ed.), § 169.

If respondent has failed to comply with the conditions of the ordinance within the time therein limited, and if a forfeiture has been legally declared by the council, it is apparent that respondent has no franchise in the street. Respondent contends that the franchise has not been legally forfeited. It is true that no ordinance repealing the former ordinance, or purporting to forfeit the franchise, has been passed, but a resolution declaring a forfeiture was adopted by the council, and thereafter notice of such forfeiture was promptly transmitted to the respondent. Our attention has not been directed to any statute or charter provision requiring that a forfeiture be declared by ordinance. When no particular mode of action has been prescribed by the legislature, or a city charter, any authorized action of a municipality may be taken by resolution, as well as by ordinance. A resolution ordinarily has the same effect as an ordinance, except in matters of legislation. *Ehrhardt v. Seattle*, 33 Wash. 664, 74

Pac. 827; *State ex rel. Jones v. Superior Court*, 44 Wash. 476, 87 Pac. 521; *Steenerson v. Fontaine*, 106 Minn. 225, 119 N. W. 400; *City of Crawfordsville v. Braden*, 130 Ind. 149, 28 N. E. 849, 30 Am. St. 214, 14 L. R. A. 268; *McGavock v. Omaha*, 40 Neb. 64, 58 N. W. 543; *Atchison Board of Education v. DeKay*, 148 U. S. 591. The respondent did not comply with the requirements of the ordinance within the time limited. The council, by resolution, declared a forfeiture, and gave notice of its action. We think the respondent thereafter had no franchise which authorized it to construct its line of road upon Front street.

The respondent, however, contends that, even though there has been a forfeiture, the relators cannot urge the same, nor can they urge the fact that respondent now has no franchise, as a defense to this action. It further insists that its right in an eminent domain proceeding to ascertain and pay damages, which owners of abutting property will sustain by reason of its occupation and use of the street, exists even though it has not yet obtained a franchise. It is true that in *State ex rel. Merriam v. Superior Court*, 55 Wash. 64, 104 Pac. 148, cited by respondent, this court, citing previous decisions, said:

"It is argued that, because the city has not granted a right of way to the condemning company across streets adjoining the property in question, therefore this property may not be condemned. This question was settled adversely to the same contention in *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198, and *State ex rel. Hulme v. Grays Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809."

In the *Merriam* case, and the other cases therein cited, each public service corporation was seeking a condemnation, appropriation, and physical taking of the real estate itself. In this action the respondent seeks by condemnation to obtain the right to damage property of the relators by occupying the street upon which it abuts, and to do so after a franchise previously granted has been actually forfeited by the town coun-

cil. Respondent entered upon the street wrongfully and without lawful authority. In so doing it created, and is now maintaining, a public nuisance.

In *Birmingham R. L. & P. Co. v. Moran*, 151 Ala. 187, 44 South. 152, 125 Am. St. 21, the court said:

"It is settled law that a railroad, constructed and operated on the streets and alleys of a city without authority of law, constitutes a public nuisance, as does also the erection of a fence and gate across any such street or alley. It is also settled law that a public nuisance may be abated or enjoined by an individual property owner who suffers injury thereby of a special nature, separate and distinct from that which the public generally sustains: 27 Am. & Eng. Ency. of Law (2d ed.), 176; Elliott on Roads and Streets, p. 500; *Louisville & N. R. R. v. Mobile J. & K. C. R. R.*, 124 Ala. 162, 166, 26 South. 895; *Weiss v. Taylor*, 144 Ala. 440, 466, 39 South. 519."

Mr. Elliott, in his work on Roads and Streets (2d ed.), at § 877, says:

"It is substantially agreed by the courts that the abutter has a private interest in the road or street as such, and if he has this right it is property which cannot be taken from him without compensation. The right to a road or street which the land-owner possesses as one of the public is different from that which vests in him as an adjoining proprietor, and it is also distinct and different from his rights as owner of the servient estate. The right which an abutter enjoys as one of the public and in common with other citizens is not property in such a sense as to entitle him to compensation on the discontinuance of the road or street; but with respect to the right which he has in the highway as a means of enjoying the free and convenient use of his abutting property it is radically different, for this right is a special one."

In *Brazell v. Seattle*, 55 Wash. 180, 104 Pac. 155, this court said:

"The right of the owner of a city lot to use the adjoining street to its full width is well established, unquestioned, and one of which he cannot be deprived without just compensation. It is as much a property right as the lot itself. . . .

Abutting owners who are deprived of the right to enjoy the street to its full width immediately in front of their property, being specially injured, are entitled to equitable relief by injunction. The ordinary and well-established rule that owners who are only remotely affected or who sustain no special injury different from that sustained by others in the vicinity, are not entitled to equitable relief, does not apply to them, nor does it deprive them of their right to seek protection in their individual capacity."

The situation before us is that the respondent has created a public nuisance in the street immediately in front of relators' property, which does them a special injury, and which they would be entitled to abate by proper legal proceedings. It has no franchise, but occupies the street wrongfully. By condemnation it is now seeking a judgment which it would ultimately plead as an estoppel or defense in any action instituted by relators to abate the public nuisance which it has created. Rights of public service corporations, asserted under eminent domain laws, should be strictly construed, and we are not prepared to hold that such a corporation, by invoking the power of eminent domain, may deprive a property owner of his right to abate a public nuisance. The rule upon which respondent relies, as announced in *State ex rel. Merriam v. Superior Court*, and *State ex rel. Hulme v. Grays Harbor & Puget Sound R. Co.*, is predicated entirely upon *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198, upon which respondent also relies. In the latter case, after referring to and commenting upon the fact that the corporation was diligently proceeding to obtain a franchise, this court, at page 638, said:

"We think that, when it is made to appear that a promoter of an enterprise of this kind is proceeding diligently with it, and nothing is shown to have occurred that will prevent its ultimate accomplishment, that the court ought not to deny the right to acquire by condemnation an essential part merely because there is a possibility that the enterprise cannot be carried to completion."

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In this case occurrences have been shown which directly tend to prevent the ultimate accomplishment of respondent's design. The franchise heretofore granted has been forfeited by affirmative action of the council, and in the absence of any later municipal action, we must presume that no additional franchise will in all probability be hereafter granted.

We are not inclined to extend the application of the rule heretofore announced in the cases cited. When one franchise has been forfeited there can be no hardship in requiring a public service corporation to secure a new franchise over a public street within the territory of a municipal corporation, before it is permitted to take possession of such street and condemn the interests of an abutting property owner. Such a rule will prevent a resort to the arbitrary methods by which the respondent has in this case obtained possession of Front street, without any franchise or authority of law, and now seeks to maintain the same. If by this attempted condemnation respondent is permitted to estop the relators from abating the public nuisance it has created and is now maintaining, it will obtain judicial sanction for acts which in their inception were arbitrary and unlawful. No such sanction should be permitted, and we hold that, by reason of the situation here presented, the relators, as a defense herein, are entitled to urge that the franchise heretofore granted has been forfeited by the municipality, and that the respondent has, without authority of law, entered upon the street and created a public nuisance. Relators will then be in a position to enjoin the public nuisance which the respondent has created by arbitrarily and clandestinely entering upon the street after a legal forfeiture of its franchise has been declared.

The judgment is reversed, and the cause remanded with instructions to dismiss the petition.

RUDKIN, C. J., PARKER, DUNBAR, and MOUNT, JJ., concur.

[No. 8835. Department Two. October 10, 1910.]

H. W. MANGOLD, *Appellant*, v. ADRIAN IRRIGATION COMPANY,
Respondent.¹

CORPORATIONS—PROMOTERS—FRAUD. A promoter of a corporation who sought to make exorbitant profit, at the expense of investing stockholders, by the sale to the corporation of land held under option without any actual investment, cannot recover from the corporation on the ground of fraud because the corporation refused to perform the contract and after forfeiture of the option bought the land direct at a low figure; since promoters owe the utmost good faith to stockholders and are accountable for secret profits.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered November 17, 1909, dismissing an action for fraud, upon withdrawing the case from the consideration of the jury after a challenge to the sufficiency of the evidence. Affirmed.

L. H. Prather, for appellant.

William E. Richardson, for respondent.

Crow, J.—This action was commenced by H. W. Mangold against Adrian Irrigation Company, a corporation, to recover damages arising out of the alleged fraudulent acts of the defendant, by which the plaintiff was induced to part with certain interests which he claimed to hold and which he alleged the defendant thereafter obtained and converted to its own use. After the plaintiff had introduced his evidence, the trial judge sustained a challenge to its sufficiency, and dismissed the action. The plaintiff has appealed.

The only question presented for our consideration is whether the trial judge erred in sustaining the challenge. The following facts were shown: On January 1, 1907, O. E. Loving and M. R. McMahon, owners of 4,765.56 acres of land in Douglas county, entered into a written contract with one C. F. Berlet, for its sale to him for \$23,827.80, or

¹Reported in 111 Pac. 173.

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about five dollars per acre, payable in five annual installments, four of \$5,000 each, and one of \$3,827.80, the first installment of \$5,000 to fall due January 1, 1908. No cash payment other than one year's advance interest at six per cent was made by Berlet. The contract by its terms provided that time should be of its essence, and that it might be forfeited at the election of the vendors for nonpayment of any installment when due.

On July 10, 1907, C. F. Berlet and the appellant, H. W. Mangold, entered into a written preliminary agreement for a sale of the land to Mangold, it being then contemplated by them that Mangold, with other persons to be interested by him, should promote the organization of a corporation to procure water rights, irrigate, and sell the land. Shortly thereafter Mangold conferred with one Lichty and several other parties in Spokane, hereafter mentioned as promoters and trustees, with the result that he and they verbally agreed to organize and promote the defendant corporation for the purpose of improving, irrigating, and selling the land. On or about September 5, 1907, Mangold filed and posted notices of water right locations in Douglas county, doing so in his own name but in realty as trustee for the promoters and the respondent corporation, his expenses being paid by them. On November 8, 1907, he transferred these water rights to James Erickson, one of the promoters, as trustee for the corporation. On October 1, 1907, Mangold entered into a written agreement with Berlet for an option to purchase the land for \$18.75 per acre, two dollars per acre to be paid on or before November 7, 1907, and the remainder in five years, except that payments were to be made to Loving and McMahon out of the \$18.75 per acre in accordance with the terms of their contract with Berlet. No cash payment was made by Mangold, but time for the first payment was afterwards extended by Berlet to December 7, 1908. The promoters caused the corporation to be organized, stock, sub-

scriptions to be taken, the land to be examined by irrigation experts, and surveys to be made.

About the same time, Mangold and all the other promoters entered into an agreement whereby the land was to be sold to the corporation by Mangold for \$30 per acre, the corporation to pay such purchase price from the proceeds of its capital stock sold to investing subscribers. It was further agreed that \$18.75 per acre was to be then paid to Berlet, \$3.12½ per acre to Mangold, and \$8.12½ to the promoters. The corporation had no funds in sight or available with which to pay the \$30 per acre, other than receipts from stock subscriptions, none of which were paid by appellant or the promoters. No payment of the \$30 per acre, or any part thereof, was made by the corporation to Mangold, nor did Berlet pay Loving and McMahon. On January 2, 1908, after the contract of sale from Loving and McMahon to Berlet, and Mangold's option had lapsed and been forfeited, the respondent corporation, through its trustees, purchased the land from Loving and McMahon for about five dollars per acre.

It will be observed that, under the agreement of appellant and the promoters, Loving and McMahon, original owners of the land, were to receive only about five dollars per acre out of the \$30 per acre, which the appellant now contends should have been paid by the respondent corporation; that Berlet was to receive a profit of about \$13.75 per acre; that Mangold was to receive a profit of \$3.12½ per acre, and that the promoters were to receive a profit of \$8.12½ per acre, all at the expense of the investing stockholders.

Appellant insists that the trustees conspired to prevent the taking up of his option before December 8, 1907; that they did so in order that it might lapse, and that they might then be enabled to purchase the land from Loving and McMahon for five dollars per acre. The substance of his contention is that the corporation and its trustees fraudulently prevented him from securing profits which he would

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have realized had they taken up his option and paid \$30 per acre, and that they committed a tort in so doing, for which the corporation should respond to him in damages. It is upon this theory that he asks judgment.

It seems to us that a mere statement of the facts is sufficient to sustain the judgment of the trial court. Appellant paid nothing for the land. He made the water locations in trust for the company. He did not own them, although he claims he did. He testified that he agreed to subscribe for the entire capital stock of the corporation. Assuming that he did, it does not appear that he actually made the subscription, or that he paid for the stock, either in money or by transferring to the corporation any title to the land. He had no title to convey. The promoters had paid nothing for the land. It was to be purchased with funds of the stockholders at an exorbitant figure, if we measure its value by the price at which Loving and McMahon were willing to sell, and actually did thereafter sell. The only apparent purpose of a purchase at \$30 per acre by the corporation was to aid appellant and the promoters in realizing excessive profits from the stockholders, on property which the promoters did not own and in which neither they nor the appellant had any funds invested. The evidence shows, that most of the promoters became trustees of the corporation; that upon learning the land could probably be purchased for five dollars per acre, they concluded to obtain it if they could at that price, and thereafter ask that the stockholders determine what compensation, if any, the promoters and appellant should receive for services rendered. Appellant objected to this proposition. He insisted upon the payment of the agreed purchase price of \$30 per acre out of the stockholders' money, and now contends that he has been defrauded by the corporation and its trustees. In support of his asserted right to recover, he cites: *Inland Nursery & Floral Co. v. Rice*, 57 Wash. 67, 106 Pac. 499; *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U. S. 206.

We need not question the law announced in these cases, as it has no application to the facts before us. In each of the cases cited the promoters of whom complaint was made, by or on behalf of the parties who subsequently acquired the stock, had, as such promoters, transferred to the corporation in exchange for stock, and at an excessive valuation, property to which at the time they had title. In this case it was proposed that the corporation should actually purchase the land with money of the stockholders, and thus enable the appellant, who held an option only, was without title, and had not invested a dollar, to obtain an enormous profit at their expense and to their prejudice. None of the promoters had paid for any of the stock, although they had subscribed. The money in the treasury of the respondent corporation had been collected from the investing public, and the promoters, who were trustees of the corporation, held it for the use and benefit of the stockholders.

The question as to how far promoters may go in obtaining profits for themselves at the expense of a corporation is not always one of easy solution. The courts generally deal with promoters as trustees, and require them to act with the utmost good faith. They cannot be permitted to reap a harvest of secret profits for themselves at the expense of existing stockholders whose funds have provided financial support for the corporate enterprise. If, without the knowledge or consent of such stockholder, the promoters cause funds of the corporation to be so disbursed as to secure undisclosed profits to themselves, they may be called to account. In *Camden Land Co. v. Lewis*, 101 Me. 78, 95, 63 Atl. 523, the court well said:

“Promoters of a corporation stand in a fiduciary relation to the corporation and to its subscribers for stock, and to those who it is expected will afterwards buy stock from the corporation. The promoters owe to them the utmost good faith. And if they undertake to sell their own property to the corporation they are bound to disclose the whole truth re-

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specting it. If they fail to do this, or if they receive secret profits out of the transaction, either in cash or by way of allotments of stock, when there are other stockholders, or it is expected that there will be other holders of new and additional stock, undoubtedly the corporation may elect to avoid the purchase; or it may hold the promoters accountable for the secret profits, if in cash; or may require a return of the stock if unsold; or if sold, an accounting for the profits of its sale."

See, also, *Mason v. Carrothers* (Me.), 74 Atl. 1030.

It does not appear from the evidence before us that the stockholders who had paid their money into the corporation, with possibly one or two exceptions, had any knowledge of, or had consented to, the proposed plan by which appellant and the promoters would make such large profits on the land for themselves, and at the expense of the corporation. Had they discovered the facts, they could have prevented the consummation of such a deal, or after its completion could have compelled restitution. Yet the appellant now insists that the trustees defrauded him by not completing the purchase at \$30 per acre with funds in the treasury, the proceeds of stock subscriptions made by investors other than the promoters. The trustees did what they were entitled to do, and what they should have done. The appellant is not entitled to recover in this action.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, DUNBAR, and MOUNT, JJ., concur.

[No. 8684. Department Two. October 12, 1910.]

GEORGIAN A. RIGGS, *a Minor, by her Guardian etc.*,

Appellant, v. NORTHERN PACIFIC RAILWAY

COMPANY, *Respondent*.¹

DEATH—RIGHT OF ACTION—STATUTES—CONSTRUCTION. Under Bal. Code, § 4828, providing that the heirs or personal representatives may maintain an action for the death of persons caused by the wrongful act or neglect of another, separate actions cannot be maintained by a widow and a child of the deceased.

APPEAL—PRESERVATION OF GROUNDS—WAIVER OF ERROR. Where separate actions for wrongful death are commenced by the widow in her own interest and as a guardian *ad litem* for a child of the deceased, when the law gives but one action, and a motion is made to require the widow to elect between the actions, error cannot be predicated on failure of the court to order a consolidation of the actions, instead of requiring an election, where such an order was not refused and the widow evidently did not desire a consolidation.

EVIDENCE—*RES GESTAE*. Where a brakeman, who fell from the side of a car, stated when found that he fell by reason of a loose hand-hold, and the parties present walked down the track and examined the cars, their statements upon their return as to the hand-hold are not admissible as part of the *res gestae*.

MASTER AND SERVANT—NEGLIGENCE—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY. Statements of the deceased, a brakeman, to the effect that while in the performance of his duties he fell from the side of a car by reason of the giving way of a hand-hold, which were part of the *res gestae*, made immediately after the accident and in the expectation of death, are sufficient to make a question for the jury as to the negligence of the company, notwithstanding evidence on behalf of the company that, upon examination of the cars next day, no defective hand-hold was discovered.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 18, 1909, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for wrongful death. Reversed.

¹Reported in 111 Pac. 162.

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Roche & Onstine, for appellant.

Edward J. Cannon, Arthur B. Lee, George M. Ferris,
and *Charles E. Swan*, for respondent.

CROW, J.—Action by Georgian A. Riggs, a minor, by Geraldine Riggs Shinn, her guardian *ad litem*, against Northern Pacific Railway Company, a corporation, to recover damages for the wrongful death of plaintiff's father. The trial judge sustained the defendant's motion for a verdict and dismissed the action. The plaintiff has appealed.

George A. Riggs was employed by the respondent corporation as a brakeman. On the evening of February 26, 1907, he fell from a car and received injuries which resulted in his death. He left one child, the appellant Georgian A. Riggs; also a widow, Geraldine Riggs, since married and now known at Geraldine Riggs Shinn, who is the guardian *ad litem* for appellant. This action was commenced by appellant, as minor child of the deceased, by her guardian *ad litem*, for damages in the sum of \$2,000. About the same time Geraldine Riggs Shinn, widow of the deceased, commenced a separate action against the railway company, for damages in the sum of \$2,000 sustained by her. It is conceded by the appellant that these separate actions were thus commenced to avoid their removal to the Federal court, the respondent being a nonresident corporation. When this action was called for trial, the court, holding the opinion that one action only could be maintained, required the widow, upon motion of the railway company, to announce whether she would waive her right to prosecute her separate action. She, protesting and excepting, waived her cause of action in order that this cause might proceed to trial. The appellant now contends that separate actions may be maintained, and that the court erred in requiring the widow to make and declare her election. There may be some doubt as to whether the order should be reviewed in this action, as in substance it affects the other action only; but as it was made herein, we will consider the question raised.

The right of action awarded to the widow and child is granted by Bal. Code, § 4828, since amended. Rem. & Bal. Code, § 183. The original section, which was the law at the time of the commencement of this action, so far as pertinent, read as follows:

“When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death.”

This language indicates an intention to grant one cause of action only, to be prosecuted in a single proceeding by the heirs or personal representatives of the deceased. Were we to hold that a separate action could be maintained by each independent heir, such a ruling might, in some instances, result in subjecting the negligent party to a multiplicity of suits for a single wrongful act. Appellant, however, insists that, if any order was to be made by the trial judge, it should have been one consolidating the actions. No such order was requested by either the appellant or the respondent. It is apparent that the appellant did not desire a consolidation. No order of consolidation was refused by the trial judge, and the question whether a consolidation should have been directed is not before us for review.

Appellant's next contention is that the trial judge erred in sustaining respondent's objection to appellant's offer of proof of certain statements made by several persons after they had examined a car which they thought had caused the injury. The injured brakeman was found lying on the north side of a house track with his feet crushed. In response to questions, he immediately stated that, as he was attempting to ascend a ladder or steps on one of the cars, a loose step or hand-hold pulled out, gave way, caused him to fall and strike his head on a rail; that he was thereby stunned to such an extent that, before he could recover, the car wheels passed over him. Evidence of this statement was admitted without objection as a part of the *res gestae*. Thereafter

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several of the parties to whom he had made these statements walked down the track to some cars which they examined. When they returned they made statements as to what they there learned relative to a certain hand-hold claimed to be loose. Appellant insisted that other witnesses who heard these statements should be permitted to testify to them as a part of the *res gestae*, and now contends that the trial judge erred in excluding their testimony. We do not think the statements of these parties were any part of the *res gestae*, although made shortly after the accident. The persons mentioned had inspected the cars and made their statements after reflection and a due consideration of what they had observed. There is no showing that these statements were spontaneous; that they related to the accident itself; the manner in which it happened, or that they were made without reflection. They were no part of the *res gestae*, and the trial court properly excluded them.

The controlling question before us is whether error was committed in directing a verdict in favor of respondent. Although we do not find this question free from difficulty, we have concluded that the case was one for the jury. No witness saw the accident, and the injured man only knew how it happened. The evidence of appellant's witnesses, in its substance and effect, was, that the injured man was found lying immediately north of the house track; that when asked how the accident happened, he stated that he fell from the car; that "one of the grab irons came loose;" "one end came loose;" "something broke and I fell back and struck my head;" that he became unconscious, and that before he could recover himself, the car passed over and injured him; that he repeated these statements after he had been carried into the depot; that thereafter two or three of the witnesses walked down the house track and examined several freight cars; that they discovered a broken hand-hold on the south side of one box car, and also noticed something that looked like blood on one or two of the south wheels.

The respondent introduced evidence tending to show that the switching was being done at Toppenish by the train crew to which Riggs belonged; that several cars on the house track, located south of the main line, were picked up by the engine and were being pulled onto the main line, for the purpose of pushing them back onto a passing track located north of the main line, and there connecting them with other cars; that it was the duty of Riggs to signal the engineer to stop when the engine and cars leaving the house track had passed a switch and reached the main line, so that the switch might be then thrown; that the engineer failed to get any signal from him, but that the engineer, knowing he had more than passed the switch, stopped without a signal and remained upon the main track awaiting a signal to back onto the passing track; that while he was thus waiting, the conductor came up and informed him of the accident to Riggs, who had just been found lying immediately north of the house track, over which the cars had just passed; that Riggs made no statement as to the cause of the accident; that the cars were then severed from the engine and left at Toppenish, while the engine was coupled onto the caboose and conveyed Riggs to North Yakima, where he died; that the identical cars which were being switched at the time of the accident were carefully examined by two of respondent's witnesses early the next morning; that they especially examined the hand-holds and grab irons, finding them free from defects; that they found blood on the north wheels of a gondola car, one of the cars which were being moved on the house track at the time of the accident.

Respondent contends that the box car upon which appellant's witnesses testified they saw blood and found a defective hand-hold was not one of the cars moved at the time of the switching and accident; that according to their evidence, the alleged defective hand-hold was on the south side of a box car; that Riggs fell on the north side of the moving cars and the house track, and that the alleged defective hand-

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hold, if any there was, could not have caused the accident. This contention as to the hand-hold, said to have been found by the appellant's witnesses, is sustained by the undisputed evidence, and that hand-hold must be eliminated as the cause of the accident. On the other hand, the evidence of the respondent's witnesses was that the cars which were being switched when the accident occurred were carefully inspected before and shortly after its occurrence, with the result that no defective hand-holds or grab irons could be found.

The trial judge evidently directed the verdict on the theory that the defective hand-hold found by respondent's witnesses could not have contributed to the accident—a correct conclusion; that the existence of no other defective hand-hold had been proven, and that no negligence was shown on the part of the respondent. In thus holding we think he committed prejudicial error. The statements made by Riggs himself were properly admitted in evidence as a part of the *res gestae*. The only theory upon which they could be admitted was that they were evidence tending to explain the accident and show how it happened. They were made by him immediately after his injury. He said he could not live. He asked for his wife and child, and according to the testimony of respondent's witnesses, repeatedly stated that his fall was caused by the hand-hold giving way. This evidence tended directly to show that there was a defective hand-hold. Riggs was the only person who knew how the accident happened. His statements, made under these circumstances, were competent evidence, were admitted, and we think tended to sustain the appellant's contention that there was a defective hand-hold.

"It is a well settled rule of the modern law of evidence as applied to civil cases that, where the making of a statement assists to constitute the transaction or to prove *per se* a relevant fact, the declaration is competent." 16 Cyc. 1152, and cases cited.

Unsworn statements which clearly constitute a part of the

res gestae are admissible as evidence in exception to the usual hearsay rule. Discussing the principle of this exception to the hearsay rule, Mr. Wigmore, at § 1747, of his work on Evidence, says:

"This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts. The ordinary situation presenting these conditions is an affray or a railroad accident. But the principle itself is a broad one."

In a foot note he further suggests that the theory is thus somewhat analogous to dying declarations. Appellant's cause should not have been withdrawn from the consideration of the jury simply because her witnesses made a mistake in looking at the wrong car where they found a hand-hold which could not have contributed to the injury, or because respondent's witnesses testified that on examination made the next day they found no defective hand-holds on the particular cars which were being moved at the time of the accident. If Riggs had lived, and in an action for damages had testified to the identical statements he made immediately after the accident, his evidence would certainly have been sufficient to show the existence of a defective hand-hold and carry his case to the jury. Whether the weight of such evidence would be sufficient to overcome that offered by the respondent would be a question for the jury, and not for our consideration.

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According to the statement of Riggs, he was engaged in the performance of his duties. An accident occurred without fault of his, by reason of a defective appliance or instrumentality furnished by his master for his use. The instrumentality being defective, caused his injuries. Under the rule announced in *LaBee v. Sultan Logging Co.*, 51 Wash. 81, 97 Pac. 1104, this evidence was for the consideration of the jury. We there said:

"Where the facts of the case are such as to eliminate blame on the part of the servant or his fellow servants, but show *prima facie* neglect on the part of some one, we think the master should be put to his proofs to show that the blame is not his, just the same as he would be were the injury to a stranger. Such a rule casts the burden upon the person who is in a position to know the facts, and who can make the proofs by direct and positive evidence, while the rule contended for by the appellant compels the resort to indirect and circumstantial evidence. . . . The injury itself proves nothing; it may have been the fault of the servant. But in a case where the servant eliminates any fault on his part by showing that the injury was caused by the giving way of an instrumentality furnished him with which to work, while he was using it for the purposes intended, and in the manner directed, he shows that the fault is in the instrumentality itself for which the master is *prima facie* responsible. The case differs from an ordinary case of injury only in the matter of proof. In each case, of course, a *prima facie* case of negligence against the master must be made out, but in the one it is made out by showing the injury, and eliminating negligence on the part of the servant and his fellow servants, while in the other it is made out by direct evidence of negligence on the part of the master."

The judgment is reversed, and the cause remanded for a new trial.

RUDKIN, C. J., DUNBAR, MOUNT, and PARKER, JJ., concur.

[No. 8746. Department One. October 12, 1910.]

WILLIAM W. GREENE, *Appellant*, v. SEATTLE ATHLETIC CLUB, *Respondent*.¹

LANDLORD AND TENANT—DANGEROUS PREMISES—LIABILITY OF TENANT—THEATERS AND SHOWS—INJURY TO SPECTATOR—CARE. A lessee, for one night only, for the purpose of giving a public entertainment, of a new state armory, constructed under laws providing for rigid supervision by state officials and experts employed by them, owes no duty to spectators to make an expert inspection of a balcony rail which was apparently safe; only reasonable, and not extraordinary, care being required.

Appeal from a judgment of the superior court for King county, Main, J., entered March 7, 1910, in favor of the defendant, upon granting a nonsuit in an action for personal injuries sustained by a spectator through a defect in the railing of a balcony. Affirmed.

E. B. Palmer, Thomas M. Askern, and Milo A. Root, for appellant, contended, among other things, that upon plaintiff's purchase of a ticket, the defendant impliedly contracted to furnish a reasonably safe place to witness the exhibition. *Francis v. Cockrell*, 5 Q. B. L. R. 501; *Scott v. University of Michigan Athletic Ass'n*, 152 Mich. 684, 116 N. W. 624, 125 Am. St. 423, 17 L. R. A. (N. S.) 234; *Weiner v. Scherer*, 117 N. Y. Supp. 1008; *Schnitzer v. Phillips*, 108 App. Div. 17, 95 N. Y. Supp. 478. Defendant should have anticipated the strain upon the railing. *Schofield v. Wood*, 170 Mass. 415, 49 N. E. 636; *Beale, Innkeepers, Hotels, and Theaters*, § 322; *Brackett, Theatrical Law*, pages 117-120; 29 Cyc. 472-3; 1 Thompson, Negligence, §§ 996, 1154-5, 1160. Regardless of an implied obligation, defendant would be liable as owner or occupier of the premises to which it invited the plaintiff. *Ward v. Hinkleman*, 37 Wash. 375, 79 Pac. 956; *Baker v. Moeller*, 52 Wash. 605, 101 Pac. 231; *Smith v. Delaware River Amusement Co.*, 76 N. J. L. 461, 69 Atl. 970; *Shear-*

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man & Redfield, Negligence (5th ed.), page 713; *Hart v. Washington Park Club*, 157 Ill. 9, 41 N. E. 620, 48 Am. St. 298, 29 L. R. A. 492; *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624, 46 Atl. 631, 50 L. R. A. 199; 24 Cyc. 1125; 29 Cyc. 453, 472-3-6; 1202 B-1204E; 1 Thompson Negligence, §§ 996, 1154-5, 1160. It was defendant's duty to make all reasonable inspections which could have revealed the defects. *Lusk v. Peck*, 116 N. Y. Supp. 1051; *Smith v. Delaware River Amusement Co.*, *supra*; 29 Cyc. 472-3; 1 Thompson, Negligence, §§ 996, 1154-5, 1160. Whether it exercised due care and performed its duty were questions of fact for the jury. *Schofield v. Wood*, *supra*; *Oxford v. Leathe*, 165 Mass. 254, 43 N. E. 92; *Scott v. University of Michigan Athletic Ass'n*, *supra*; *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829; *Higgins v. Franklin County Agricultural Society*, 100 Me. 565, 62 Atl. 708, 3 L. R. A. (N. S.) 1132; *Currier v. Boston Music Hall Ass'n*, 135 Mass. 414. Plaintiff made out a *prima facie* case of negligence and thereby shifted the burden of proof to the defendant. *LaBee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560, 20 L. R. A. (N. S.) 405; *Anderson v. McCarthy Dry Goods Co.*, 49 Wash. 398, 95 Pac. 325, 126 Am. St. 870, 16 L. R. A. (N. S.) 931; *Schnitzer v. Phillips*, *supra*; *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788. See, also, 24 Cyc. 1125; 29 Id. 453, 476; Thompson, Negligence, §§ 996, 1155, 1160; *Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 776; *Glass v. Colman*, 14 Wash. 635, 45 Pac. 310; *Ward v. Hinkleman*, *Smith v. Delaware River Amusement Co.*, *Scott v. University of Michigan Athletic Ass'n*, *Weiner v. Scherer*, and *Lusk v. Peck*, *supra*.

O. B. Thorgrimson, D. C. Conover, and Harold Preston,
for respondent.

Gose, J.—The respondent, a Washington corporation, was organized, among other things, “to give for profit and charge admission to athletic exhibitions, football games and

baseball games, regattas, and running and sailing races." On the 6th day of May, 1909, it leased the armory in Seattle from the state for one evening only, and gave an exhibition, charging an admission fee. The entertainment consisted chiefly of foot races. The portion of the armory used consisted of the drill room, about one hundred feet by two hundred feet in dimensions, with a balcony about fourteen feet in width extending around the interior walls at a height of about twelve feet from the floor. Three rows of seats, arranged in amphitheater fashion, extended around the building. Around the entire front of the balcony, about twenty inches from the first tier of seats, there was a railing about three feet in height, constructed of iron pipe about two inches in diameter, fastened to vertical bars nine feet apart, made of like material but somewhat larger, each of which was attached to the floor of the balcony by an iron plate containing four screws, each two inches in length. There were no lateral braces, and the screws did not extend into the heavier material upon which the floor of the building rested. One of the features of the evening was a Marathon race. The final lap was closely contested, and the interest in the result became so great in the finish of the last lap that the spectators on the east side of the balcony where the appellant was sitting arose, pushed forward in great numbers, and leaned upon the railing so that they might get a better view—the contestants then being under the balcony—causing the railing to break its connections and precipitate the appellant and others to the floor below, and injuring the appellant. There were several races preceding the accident. The appellant testified that the spectators leaned upon the rail "every time the contestants came underneath the gallery—several times" prior to the accident, and that the railing seemed "perfectly safe," and that it appeared to be solid and substantial. The expert testimony discloses that a careful inspection by a competent builder or architect would have disclosed the defective con-

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nection between the rail posts and the floor, but that it would not have been noticed by such experts from a casual examination. The following interrogatory propounded to the respondent, with the answer thereto, is the only evidence touching the question of an inspection:

"Q. Did the Seattle Athletic Club or its agents make any inspection of the Seattle Armory prior to May 6, 1909? A. It is impossible to answer interrogatory 4 by yes or no. The superintendent and physical director of the Seattle Athletic Club were in the armory building on the afternoon of the day on which the exhibition was given, and observed in a general way the arrangement of the room in which the exhibition was given. It would not, however, be correct to say that they made an inspection of it in the way of examining the details of its construction. They observed the railing around the gallery and observed that it was very solid and substantial in appearance."

The only negligence claimed is that the posts or stanchions to which the railing was attached were not securely fastened. It is not claimed that the balcony was overcrowded. At the close of the appellant's evidence, a judgment of nonsuit was entered, from which the appeal is prosecuted.

The appellant contends that, when he purchased a ticket and entered the building, an implied contract arose between the parties which made it obligatory upon the respondent to furnish him a reasonably safe place in which to witness the exhibition. This is undoubtedly the general rule applicable to the owner of such a building, or a lessee for a considerable period of time. It is, however, limited in its application by another rule equally well settled, that reasonable care only is exacted by the law. This is a relative question, depending upon the character of the business in which the party sought to be charged is engaged. *Phillips v. Wisconsin State Agricultural Society*, 60 Wis. 401, 19 N. W. 377; *Williams v. Mineral City Park Ass'n*, 128 Iowa 32, 102 N. W. 783, 111 Am. St. 184, 1 L. R. A. (N. S.) 427; *Odell v. Solomon*, 99 N. Y. 635; *Thornton v. Maine State Agricultural Society*,

97 Me. 108, 53 Atl. 979, 94 Am. St. 488; *Currier v. Boston Music Hall Ass'n*, 135 Mass. 414; *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829; 29 Cyc. 453; 1 Thompson, Negligence, §§ 994-5; Beale, Innkeepers and Hotels, § 324; *Graves v. Baltimore & N. Y. R. Co.* (N. J.), 69 Atl. 971; *Schofield v. Wood*, 170 Mass. 415, 49 N. E. 636.

The standard of due care is measured in all cases by the conduct of the average prudent man. The pivotal question in the case is, did such standard require the respondent to have the building inspected by an architect or structural engineer or other competent person? The answer to this question requires a brief reference to the history of the construction of the armory. The armory was erected by the state under the provisions of the Laws of 1907, page 83 *et seq.*, the sum of \$130,000 being appropriated from the military fund for its construction. It required the governor to appoint a board or commission of six members, comprised of the adjutant general of the national guard of Washington, the ranking officer of the active list of the national guard stationed at Seattle, the state board of control, and the chairman of the board of county commissioners of King county, all of whom were *ex-officio* members of the board. The members of the board were required to act as such until the completion of the armory and acceptance thereof by the state, and to give a bond to the state to be approved by the governor, in the sum of \$5,000, conditioned for the faithful performance of the duties imposed upon them by the act. Section 6 of the act required the board "to select the most desirable site, plan and design, and to obtain proper architectural designs, plans and specifications and details, in conformity with such plan and design; to secure the erection and completion of such armory building, conforming faithfully to such plan and design." Section 7 of the act provides that, "All material contracted for shall be of the best quality and to the satisfaction of the board, and the directions, plans and specifi-

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cations of the work executed and carried out by skilled and reputable architects, artists, mechanics and laborers, likewise to the satisfaction of the board."

Section 8 provides that,

"The architect chosen by each of these boards shall receive such compensation for his plan and design as the board shall deem reasonable. He shall be supervising architect of said building, and for all contracts for construction or material therefor. He shall see that all material furnished and work done shall be of the best quality, and all contracts with said board are faithfully performed by the parties so contracting with said board. He shall perform all other duties devolving upon him as such architect, and the supervising architect of said building, and may be removed at the pleasure of said board."

and that he should furnish a surety company bond to the state in the sum of \$10,000, conditioned for the faithful performance of his duties, by said architect, his assistants and his subordinates.

Section 10 makes the attorney general the legal adviser of the board. Section 11 provides that the commander-in-chief (the governor) shall make such rules and regulations as he may deem expedient to govern the armory. Section 97, Laws of 1909, page 494, provides that the commander-in-chief (the governor) shall promulgate in general orders such regulations for the use of armories as may be proper; that no armory shall be used for other than strictly military purposes without the recommendation of the officer in charge thereof, and that all revenues derived from rentals of the armory shall be turned into the state treasury. The armory was completed in 1909, and rented to the respondent by the adjutant general of the state. The respondent had no right to make any changes in the building.

If fair and reasonable minds might differ as to whether the respondent was negligent, the court was in error in withdrawing the case from the jury. Viewing the case from the standpoint of the conduct of the average prudent man, we

cannot escape the conclusion that there was no duty of further inspection upon the respondent. The defect was not patent. It took the building for one night only, and it had a right to rely upon its apparent safety. The building was new and, as we have seen, had been constructed by the state under a law which provides for the most careful and rigid supervision by the highest officers of the state and the superintendent and architect selected by them. An inspection by experts under such circumstances would have been the exercise of extraordinary care, an act which we are persuaded would not have occurred to any reasonable man. A different degree of care might apply to the builder and owner, and no doubt would apply if he were a private individual; but as to whether it applies to the state, we express no opinion.

"Failure to make certain tests is not negligence where it does not appear that such tests were common or prudent, or where the owner had no reason to think an inspection was necessary." 29 Cyc. 472.

See, also, *Hall v. Murdock*, 119 Mich. 389, 78 N. W. 329; *Baddeley v. Shea*, 114 Cal. 1, 45 Pac. 990, 55 Am. St. 56, 33 L. R. A. 747.

In *Baddeley v. Shea*, the plaintiff, who was in the employ of a transfer company, while carrying a trunk from the defendant's house, was injured by the breaking of a step upon a platform which formed a part of a continuous walk from the defendant's house to the street. It appeared that the platform had been properly built, and that the defendant had no knowledge that it was unsound or unsafe. An examination after the accident disclosed a dry rot on the under side of the plank that broke, and of the stringer on which it rested, which was not apparent from the outside, and which was discoverable only by making an opening through or under the vertical side of the steps sufficient to admit a person under the platform, which was about one foot above the

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ground. Applying the law to the facts stated, the court said:

"It should be borne in mind, however, that the ultimate question of law to be decided is whether it was the duty of the defendant, under the circumstances proved, to examine his platform for the purpose of ascertaining whether there were latent defects in it; for, if such was not his duty, his omission to make such examination was not negligence in any degree, and the defendant was entitled to a verdict (*Smith v. Whittier*, 95 Cal. 279); and whether or not such was his duty depends entirely upon whether or not he had notice of facts which would induce a man of ordinary prudence to suspect the existence of a latent defect in consequence of which danger of injury to person or property might be reasonably apprehended; and when, in such a case, the facts, of which one charged with negligence had notice, are known and undisputed, the question of duty to examine for latent defects is a pure question of law, though it may involve a question as to the degree of care required, which is also a question of law when the facts are given. (*Stratton v. Central etc. Horse R. Co.*, 95 Ill. 25; Sackett on Instructions to Juries, 15.) In accordance with these principles, courts grant non-suits and direct verdicts in actions for negligence, whether the negligence in question be that of the defendant or contributory negligence of the plaintiff."

In *Ryder v. Kinsey*, 62 Minn. 85, 64 N. W. 94, 54 Am. St. 623, 34 L. R. A. 557, the plaintiff's minor son was injured by the fall of a brick veneered wall. The evidence showed that the brick wall was not anchored to the studding or sheeting or to the frame of the building in the customary way, or attached to them in any way, or otherwise supported. There was no evidence that the defect could have been discovered by the exercise of ordinary care on the part of the owner. The defendant had purchased the building after its completion. The court said that the defendant did not build the wall; that its external appearance did not disclose its defective condition; that the defect could not have been discovered by the exercise of ordinary care in the inspection of the build-

ing; and that the jury were correctly instructed to return a verdict for the defense.

"Where the landlord has provided apparatus which is obviously defective, the tenant must either abstain from using it, or must use it with a degree of caution which would be wholly unnecessary if proper works had been put up. But where the defect is not obvious, and is not in fact known to the tenant (which is in such a case to be presumed) he is not bound to use more care than the external appearance of the works seems to demand." 2 Shearman & Redfield, Negligence (5th ed.), § 724.

"The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable nor waste his anxiety on events that are barely possible. He will order his precautions by the measure of what appears likely in the known course of things." Pollock, Torts, 36.

In *Eckman v. Atlantic Lodge*, 68 N. J. L. 10, 52 Atl. 293, the court, in speaking of the duty of a temporary lessee to inspect the building, said:

"Whether such a duty rests upon the temporary lessee of a building constructed and used for public purposes may be doubted, and the determination of this case does not require a decision of that question."

The lessee of the building was exonerated from liability, on the ground that the defect which caused the injury was a latent one. In *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788, a grand stand owned and constructed by the defendant fell, and the plaintiff was injured. Speaking to the liability of the defendant, the court said that such structures were constructed for the accommodation of a great number of people who at times would be moved to excitement, activity and demonstration, thereby subjecting the structure to great weight and strain; that such conditions must be regarded as within the contemplation of the builders of such structures when they were erected. The defendant had leased the grand stand to a cycling club for the day on which the accident occurred, and the club was giving cycling

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racers. Answering defendant's contention that the cycling club alone was liable, the court said:

"If the plaintiff had brought an action against the cycling company, it would have been incumbent upon her to have shown that, as the lessee of the defendant, it had notice of the defective condition of the stand, or should with reasonable care have known of its condition."

The last two cases are the only ones called to our attention which discuss the duty or obligation of a temporary lessee.

The drill room was constructed by the state for public exhibitions. The seating capacity of the gallery was not wholly taken. The gallery was not overcrowded. The railing gave way on account of a latent structural defect, and not because too many people had been admitted. The railing had the appearance of being safe. The respondent, upon the facts stated, was warranted in relying upon its appearance. It had a right to assume that it was structurally sound. Upon the whole record, we are constrained to hold that there is no cause of action against the respondent.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, and CHADWICK, JJ., concur.

MORRIS, J., holding a membership in the respondent, was disqualified and took no part.

[No. 8595. Department One. October 12, 1910.]

JAMES H. GREEN, *Appellant*, v. OKANOGAN COUNTY *et al.*,
Respondents.¹

APPEAL—DISMISSAL—CESSATION OF CONTROVERSY. An appeal from a judgment dismissing an action to enjoin the execution of a contract for the construction of a county bridge, will not be dismissed on the ground that the controversy has ceased by reason of the defendant's execution of the contract since the appeal was taken; since the court may still grant the appellants relief if the judgment was erroneous.

¹Reported in 111 Pac. 226.

BRIDGES—PROCEEDINGS—NAVIGABLE STREAMS—STATUTES—REPEAL. Rem. & Bal. Code, § 5680, providing for publishing notice and preliminary steps to declare a public necessity etc., before letting contracts for county bridges across navigable streams, was not superseded by the act of 1893 (Rem. & Bal. Code, § 5575), a general act, not complete in itself, relating to county road and bridge work, and containing no specific provisions relating to contracts for bridge construction across navigable streams; nor was it superseded by the act of 1903 (Rem. & Bal. Code, § 5585), relating to the letting of contracts where the estimated cost exceeds \$150, since the latter is merely supplemental to and not conflicting with the earlier act, which relates chiefly to steps preliminary to the letting.

SAME—EFFECT OF FEDERAL ACT. The operation of Rem. & Bal. Code, § 5680, providing for publishing notice and preliminary steps to declare a public necessity etc., before letting contracts for county bridges across navigable streams, is not affected by the subsequent Federal acts providing that navigable streams shall not be bridged except by consent of Congress and upon executive approval of the plans, as this but imposes an additional burden upon the county.

SAME—CONTRACTS—ADVERTISING FOR BIDS—EMERGENCY—STATUTES—CONSTRUCTION. No emergency exists excusing the county commissioners from letting a bridge contract without competitive bids, within the contemplation of Rem. & Bal. Code, § 5585, in the case of new construction and where all the former means for crossing the river remained intact, and there was no sudden increased demand rendering existing facilities inadequate for the short time (three weeks) necessary for advertising for bids.

COUNTIES—COMMISSIONERS—CONTRACTS. County commissioners in letting a bridge contract must strictly comply with the law, or it is not binding and money paid thereon can be recovered.

COUNTIES—CONTRACTS—ACCEPTANCE OF BENEFITS UNDER ILLEGAL CONTRACT—RECOVERY. Where a county has accepted and is using a county bridge, constructed under a contract let without complying with the law, but which the county could have entered into if it had conformed to the statutory requirements, it is liable for its reasonable value, and can only recover any excess wrongfully paid out (RUDKIN, C. J., dissenting).

COUNTIES—CONTRACTS—BRIDGE DONATIONS—RECOVERY. Money donated to a county to induce the construction of a county bridge belongs to the county, and may be recovered by the county if it has been wrongfully paid out under an unauthorized contract.

Appeal from a judgment of the superior court for Okanogan county, Taylor, J., entered October 5, 1909, upon find-

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ings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to enjoin the execution of a contract. Reversed.

Alvin W. Barry, for appellant, contended that the Federal act was not repugnant to, and did not repeal, the state law. *Sinnot v. Davenport*, 63 U. S. 227; *Cummings v. Chicago*, 188 U. S. 410; *Lake Shore & M. S. R. Co. v. Ohio*, 165 U. S. 366; *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105; *Gulf C. & S. F. R. Co. v. Meadows* (Tex. Civ. App.), 120 S. W. 521; *State ex rel. Ellis v. Gerbing*, 56 Fla. 603, 47 South. 353. In the dispensation of public money, the board of county commissioners acts as a trustee for the public, and the law must be strictly complied with. *Smith v. Lamping*, 27 Wash. 624, 68 Pac. 195; *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *Chehalis County v. Hutcheson*, 21 Wash. 82, 57 Pac. 341, 75 Am. St. 818; *McAllister v. Okanogan County*, 51 Wash. 647, 100 Pac. 146, 24 L. R. A. (N. S.) 764; *Sadler v. Board of Com'rs of Eureka County*, 15 Nev. 39; *Foster v. Coleman etc.*, 10 Cal. 278; *County of Modoc v. Spencer*, 103 Cal. 498, 37 Pac. 483; *Jones v. Commissioners of Lucas County*, 57 Ohio St. 189, 63 Am. St. 710; 11 Cyc. 390, and cases cited. These principles have been applied in county bridge cases. *Wrought Iron Bridge Co. v. Board of Com'rs of Hendricks County*, 19 Ind. App. 672, 48 N. E. 1050; *Commonwealth ex rel. Carlson v. Baker*, 212 Pa. St. 230, 61 Atl. 910. See, also, *Sturgeon v. Hampton*, 88 Mo. 203; *Alderson v. St. Charles County*, 6 Mo. App. 420, 426; *Dirks v. Collin*, 37 Wash. 620, 79 Pac. 1112. The invalidity of these contracts, occasioned by a failure of the county commissioners to observe the law of 1891 in first determining the existence of a public necessity for said bridge, cannot be waived by a subsequent ratification thereof. *Board of Supervisors of Jefferson County v. Arrighi*, 54 Miss. 668; *Arnott v. Spokane, supra*; 9 Cyc. 475;

Cumberland Telephone & Telegraph Co. v. Evansville, 127 Fed. 187; *McCurdy v. Shiawassee County*, 154 Mich. 550, 118 N. W. 625; 11 Cyc. 468; *Bauer v. Franklin County*, 51 Mo. 205. Where the mode of contracting is expressly provided by law, no other mode can be adopted which will bind the corporation. *Arnott v. Spokane*, *supra*, and cases cited. *State ex rel. Spring Water Co. v. Monroe*, 40 Wash. 545, 82 Pac. 888; *Zottman v. San Francisco*, 20 Cal. 97; *Smith v. Lamping*, 27 Wash. 624, 68 Pac. 195. It excludes all other modes of procedure. *Sadler v. Board of Com'rs of Eureka County*, *supra*; *State ex rel. Holley v. Boerlin*, 30 Nev. 473, 98 Pac. 402; 2 Abbott, *Municipal Corporations*, pages 1414, 1415. There was no emergency within the meaning of the law dispensing with notice. *Colfax County v. Butler County*, 88 Neb. 803, 120 N. W. 444; *Board of Supervisors of Logan County v. People etc.*, 116 Ill. 466, 6 N. E. 475; *People ex rel. Com'rs of Highways v. Board of Supervisors*, 21 Ill. App. 271; *People v. Lee Wah*, 71 Cal. 80, 11 Pac. 851; *Sheehan v. City of New York*, 37 Misc. Rep. 432, 75 N. Y. Supp. 802; *Burger v. Omaha etc. St. R. Co.*, 139 Iowa 645, 117 N. W. 35, 130 Am. St. 343.

William C. Brown, Roberts, Battle, Hulbert & Tennant, C. J. France, and P. D. Smith, for respondents, contended, among other things, that, in so far as Congress assumes to act, all state authority recedes before it. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1; *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211; *Cummings v. Chicago*, *supra*; *Montgomery v. Portland*, 190 U. S. 89; *Grays Harbor Boom Co. v. Lonsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267; *Palmer v. Peterson*, 56 Wash. 174, 105 Pac. 179. No state law can hinder or obstruct the free use of a license granted under an act of Congress. *Pennsylvania v. Wheeling etc. Bridge Co.*, 54 U. S. 518. When Congress has authorized the erection of a bridge, it is not necessary to obtain the consent of the state authorities for its erection. *Cobb v. Com-*

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missioners of Lincoln Park, 202 Ill. 427, 67 N. E. 5, 95 Am. St. 258, 68 L. R. A. 264; *Stockton v. Baltimore & N. Y. R. Co.*, 82 Fed. 9; *Scranton v. Wheeler*, 179 U. S. 141. If Congress declares a structure to be lawful, neither the state legislature nor state courts can declare it unlawful as interfering with navigation, or require consent or concurrence by the state. *Frost v. Washington County R. Co.*, 96 Me. 76, 51 Atl. 806, 59 L. R. A. 69; *Stockton v. Baltimore & N. Y. R. Co.*, *supra*; *Decker v. Baltimore & N. Y. R. Co.*, 30 Fed. 723; *Pennsylvania R. Co. v. Baltimore & N. Y. R. Co.*, 37 Fed. 129. The state act of 1891 was void because in conflict with the river and harbor act. *Hagan v. Richmond*, 104 Va. 723, 52 S. E. 385, 3 L. R. A. (N. S.) 1120. The recitals in the records established the emergency contemplated by the statute. 11 Cyc. 400; 1 Elliott, Evidence, § 405; 2 Id. §§ 1273, 1277; *Dikeman v. Parrish*, 6 Pa. St. 210, 47 Am. Dec. 455; *Bardsley v. Sternberg*, 18 Wash. 622, 52 Pac. 251, 524; *Grafton v. Reed*, 34 W. Va. 172, 12 S. E. 767; *Sawyer v. Manchester etc. R. Co.*, 62 N. H. 135, 13 Am. St. 541; 2 Abbott Trial Brief (2d ed.), page 1914, § 78. The county commissioners were sole judges of the emergency. *Garrigus v. Board of Com'rs of Howard County*, 157 Ind. 103, 60 N. E. 948; *Farrelly v. Cole*, 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464; *State v. Fair*, 35 Wash. 127, 76 Pac. 731, 102 Am. St. 897; *Dillon v. Whatcom County*, 12 Wash. 391, 41 Pac. 174; *Reed v. Gormley*, 47 Wash. 355, 91 Pac. 1093; *State ex rel. Porter v. Headlee*, 19 Wash. 477, 53 Pac. 948. There has been a cessation of the controversy entitling the respondent to a dismissal of the appeal. *State ex rel. Scottish-American Mtg. Co. v. Meacham*, 17 Wash. 429, 50 Pac. 52.

FULLERTON, J.—The board of county commissioners of Okanogan county entered into a contract with the Puget Sound Bridge & Dredging Company and Charles Ostenberg for the construction of a bridge across the Okanogan river, for a stated consideration, to be paid in part from moneys

belonging to Okanogan county and in part from moneys subscribed for that purpose and turned over to the county by citizens of Okanogan city, a town situated on the Okanogan river at the point where it was proposed to construct the bridge. After the contract had been let, the present action was begun to enjoin its execution, the plaintiff, appellant here, making parties defendant thereto all of the principals to the contract, including the members of the board of county commissioners as individuals. The contract was attacked on the ground that the commissioners had not complied with the requirements of the statute in its execution. The trial judge held against the contention of the plaintiff, and entered a judgment dismissing the action. This appeal was taken therefrom.

The respondents moved to dismiss the appeal, on the ground that there has been a cessation of the controversy. It appears from affidavits filed subsequent to the perfection of the appeal, that the board of county commissioners executed the contract after the dismissal of the action in the court below, and it is contended that now there is nothing upon which the injunction can operate, as the acts of the defendants sought to be enjoined have been fully performed. But this contention mistakes the power of the court. It is true that when, pending an appeal from the judgment of the lower court, and without any fault on the part of the respondent, an event occurs which renders it impossible to enter a judgment in favor of the appellant which will give any effectual relief, the court will not proceed to a formal judgment but will dismiss the appeal; and it is held, also, that the same result will follow if the intervening event is owing to some voluntary act of the appellant. But no such result follows merely because the respondent has changed the status of the subject-matter in litigation. So in this case, if it appears that the contract entered into was subject to be enjoined because in violation of the statutes, the court may now inquire into the subsequent acts of the respondents and

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compel them to undo what they have wrongfully done, in so far as it is capable of undoing, and to answer in damages for anything that cannot be undone.

This principle was announced in the early case from this court of *Hartson v. Dale*, 9 Wash. 379, 37 Pac. 475. There an action was begun to enjoin a county treasurer from paying a county warrant which had been unlawfully issued. The relief was denied in the court below, and pending the appeal, the warrant was paid by its treasurer. This fact was shown to this court and a motion to dismiss the appeal on that ground was made. But the court denied the motion, reversed the judgment of the court below, and sent the case back for further proceedings. But while this case was correctly decided, it is probable that a wrong reason was given in support of the conclusion of the court. The decision was rested on the ground that it would be highly inequitable to allow any subsequent action of the respondent to have the effect of subjecting the appellant to the costs of a meritorious appeal, while the decision ought to have been rested on the ground we have before indicated; namely, that the court had power to enter an effectual decree by compelling the parties to undo what they had wrongfully done, or compel them to answer in damages therefor. In *Farnsworth v. Wilbur*, 49 Wash. 416, 95 Pac. 642, it was held that the court, in an action of equitable cognizance, had power to issue mandatory as well as prohibitory injunctions, and could, in virtue of its powers, compel the undoing of those acts which have been illegally done—in that case, to compel the vacation of an illegal transaction in which a judgment had been satisfied and discharged of record in consideration of a payment less than the whole. In *Mills v. Green*, 159 U. S. 651, the court used this language:

“If a defendant, indeed, after notice of the filing of a bill in equity for an injunction to restrain the building of a house, or of a railroad, or of any other structure, persists in completing the building, the court nevertheless, is not deprived

of the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit, and to compel the defendant to undo what he has wrongfully done since that time, or to answer in damages."

See, also, *Tucker v. Howard*, 128 Mass. 361; *Pennsylvania Co. v. Bond*, 99 Ill. App. 535; *Tate v. Field*, 56 N. J. Eq. 35. The fact that no temporary injunction has been granted does not affect the kind or the extent of the remedy to which the plaintiff is entitled upon establishing his right at the hearing on the merits. *Tucker v. Howard*, *supra*. The motion to dismiss will be denied.

Passing to the merits of the controversy, it remains to inquire whether or not there was a compliance with the statutes in the letting of the contract. That portion of the Okanogan river from its mouth to a point above the site of the bridge is navigable, being capable of floating water craft of considerable dimensions. In 1891 the legislature of this state passed an act relating to the construction of bridges across navigable streams by boards of county commissioners, the material part of which is found in § 5680 of Rem. & Bal. Code, which reads as follows:

"Whenever the county commissioners of any county or counties desire to erect a bridge on any public highway across a navigable stream, under the provisions of this act, said board or boards shall cause to be published a notice in a newspaper of general circulation in the county or counties, if such there be; and if there be no newspaper published in the county or counties, then by posting three notices, one in the locality of the place to be bridged, and two in the most public places in the county or counties; such notice shall contain the name of the stream to be bridged and the exact point where such bridge is to be erected, and the date when the said board will determine the public necessity for the building of said bridge: Provided, that when such bridge is to be built by two counties, the notice shall be published in both counties. At the time fixed in such notice the board of county commissioners shall declare such public necessity by an order of record, which said order shall, in addition to the other

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facts, prescribe the width of the draw to be made, if any draw shall be considered necessary in such bridge, and also the length of span necessary to permit the free flow of water: Provided, that such bridges shall be so constructed as not to interfere with, impede, or obstruct the navigation of such streams."

There is no pretense that the commissioners in letting the contract for the construction of this bridge complied, or attempted to comply, with the provisions of this statute. The commissioners seek to excuse themselves, however, by asserting that the statute is no longer in force, it having been superseded, it is contended, both by subsequent state legislation and by Congressional enactments on the same subject. The state legislation referred to is the act of March 9, 1893 (Laws 1893, p. 147; Rem. & Bal. Code, § 5575), and the act of March 16, 1903 (Laws 1903, p. 225; Rem. & Bal. Code, § 5585). The first of these acts, while it relates to the construction, repair and improvement of public highways generally, contains no specific provision relating to contracts for the construction of bridges over navigable streams, nor does it purport to cover within itself the entire law on the subject-matter of which it treats; for example, it contains no provision relating to obtaining a right of way for public highways, or the construction of highways lying in two or more counties, or the construction or repair of bridges across streams which form the boundary line between two counties, or the manner of letting of contracts for the construction of bridges generally. These were matters perhaps that would fall within the title and spirit of the act, but since the act contains no provision relating to them, the act cannot be said to have been a complete act on the subject of roads and bridges; and consequently, since there is no direct conflict between the acts, there can be no implied repeal of the one by the other.

The second act cited is more to the point, as it does contain a specific provision with relation to the construction of bridges. But there is nevertheless no conflict between the

acts. The act thought to be superseded, it will be noticed, relates chiefly to the preliminary steps to be taken before any attempt is made to let the contract for the construction of the bridge, while the latter relates solely to the letting of the contract. It provides that bridge construction of which the estimated cost is more than one hundred and fifty dollars, except in cases of emergency, shall be let by contract by the county commissioners on plans and specifications previously prepared, etc. The later act, therefore, but supplements the earlier one, and cannot under any construction operate as a repeal of it.

The Federal statutes are intended to protect the rights of the public at large in navigable streams, or perhaps more accurately, the right of navigation thereon. In substance they provide that no navigable stream shall be bridged at all without the consent of Congress, and when consent is given, that the bridge constructed shall be according to plans and specifications approved by the chief of engineers and by the secretary of war. But it is manifest that these statutes in no way interfere with the operation of the state statutes. They impose an additional burden on the county commissioners, inasmuch as the plans adopted by them must meet the approval of the Federal authorities named, but they offer no other hindrance to the workings of the state statutes. We think, therefore, that the statute quoted was in force at the time the contract in question was entered into.

But the statutes of the state were also violated in another particular. The contract for the construction of the bridge was let without calling for competitive bids, although the contract called for an expenditure in excess of one hundred and fifty dollars. This act on the part of the commissioners is sought to be excused by the plea that an emergency existed which would not permit of a delay long enough to do the necessary advertising. But we can find no support in the record for the contention. It might perhaps be that were all of the bridges across a stream lying between two

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populous centers to be destroyed by a sudden flood or other unlooked for catastrophe, that such an emergency would exist for the replacement of some one or more of them that the public authorities would be justified in entering upon the work of replacement without calling for competitive bids, but it is difficult to understand how any such necessity can arise with reference to entirely new construction. But be this as it may, there was clearly no such necessity in this instance. All of the means for crossing the river that had theretofore served the people were still intact, no sudden flood or other catastrophe had interfered with their operation, nor was there any sudden increase in the number of persons desiring to cross the river as to render the existing facilities inadequate; in fact, nothing necessitating the construction of the bridge was shown other than the fact that the increase in population was generally outgrowing the existing facilities. Under these circumstances it seems worse than idle to argue that the rush was so great as not to brook of a delay of three weeks, the time required to advertise for competitive bids.

As boards of county commissioners themselves are but creatures of the statute, they must pursue and exercise the powers conferred on them in strict compliance with the statutes. Only by so doing, can they bind their principal. Contracts entered into in defiance of the manner pointed out by the statutes, or which have no support in the statutes, bind no one. Money paid out in pursuance of such contracts can be recovered back from any person into whose hands it can be traced. In fine, the proceedings, in so far as they affect the county, are nullities. *Smith v. Lamping*, 27 Wash. 624, 68 Pac. 195; *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *Wrought Iron Bridge Co. v. Board of Comrs.*, 19 Ind. App. 672; *Commonwealth v. Baker*, 212 Pa. 230, 61 Atl. 910.

From the foregoing considerations it necessarily follows that the contract in question was void, and affords no justification for the acts of the board of county commissioners,

nor of the other parties to the contract who acted under it. But we cannot follow the appellant's argument to the effect that such persons are jointly and severally liable to return to the county treasurer the money of the county directed to be paid out by the board and received by the persons building the bridge. While this may be the rule in some jurisdictions, this court has adopted the more equitable doctrine of allowing the parties, where the contract is entered into in conformity with the statutes would not have been unlawful, to retain from the moneys received by them a sum equivalent to the reasonable value of the property the county acquires and retains in virtue of the execution of the void contract. Such, in substance, is the doctrine of the case of *Criswell v. Directors School District No. 24*, 34 Wash. 420, 75 Pac. 984. To the same effect is *Chapman v. County of Douglas*, 107 U. S. 348, cited in the case from this court. There a county had entered into an illegal contract for the purchase of a farm of which it had received a conveyance. The court held the county liable, independent of the contract, to make payment for the land or reconvey it to the vendors. In the course of the opinion, this language was used:

"The agreement, as we have assumed, so far as it relates to the time and mode of payment, is void; but the contract for the sale itself has been executed on the part of the vendor by the delivery of the deed, and his title at law has actually passed to the county. As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *Marsh v. Fulton County*, 10 Wall. 676, 684, and repeated in *Louisiana v. Wood*, 102 U. S. 294, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.'"

So in this case, since the county has accepted and made use

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of the bridge, it is liable to the builders for its reasonable value, and it is entitled to recover only the difference between the reasonable value of the bridge and the amount paid for its construction.

As we have elsewhere stated, one-half the cost of the bridge was contributed by donations to the county from private parties interested in the construction of the bridge. It is suggested that in case it is found that the reasonable value of the bridge is less than the amount paid for its construction, only one-half of such difference should be refunded to the county. But we think the county entitled to the entire difference. The gift to induce the construction of the bridge was to the county and paid into the county treasury, not to the board of county commissioners nor to the contractors, and the county is entitled to its return if it has been wrongfully paid out.

The judgment appealed from is reversed, and the cause remanded with instructions to reinstate the case, take an accounting of the moneys paid out by the county in the construction of the bridge, and ascertain the reasonable value of the bridge, and if the amount paid by the county exceeds the reasonable value of the bridge, enter a judgment against the parties receiving the money for the difference; if the value of the bridge equals or exceeds the sum paid for its construction, then enter a judgment to the effect that the appellant take nothing by his action. Costs in this court will be allowed the appellant; costs in the court below to abide the event of the final hearing.

MORRIS, J., concurs.

GOSE, J. (concurring)—In concurring I desire to add a few words to what has been said by Judge Fullerton. This is a suit in equity, prosecuted by a taxpayer upon behalf of all the taxpayers of the respondent county. The fact that the contract has been executed since the commencement of the action ought not to defeat the right of the appellant to

such relief as equity can afford. As a taxpayer he was interested in the contract being let in the manner provided by law. The purpose of the statute in requiring the giving of notice was to prevent collusion and fraud, and to insure the public against extravagance. The contract was one which the commissioners had the power to make by pursuing the method directed by the statute. Failing to comply with the statute, the contract is not enforceable, but the county is holden for the reasonable value of the bridge. If contractors are only allowed to recover such reasonable value, the spirit of the statute will be met. The law-making body assumed that the giving of the notice and letting the contract to the lowest bidder would insure the public that it would secure the work for a reasonable price. The county cannot be held for more than the reasonable value of the work, and the principles of common honesty, applicable alike to natural and artificial persons, forbid that it shall retain and use the bridge and pay a less sum. Whatever sum, if any, it has paid in excess of the reasonable value of the work can be recovered in this action and be restored to the county. The further progress of the case may require the filing of a supplemental bill, but the relief indicated is within the equity powers of the court. All the parties in interest are before the court. To avoid a multiplicity of suits a court of equity, when it has acquired jurisdiction over a matter for a particular purpose, will determine the whole controversy and confer complete relief. The denial of injunctive relief does not exhaust the court's jurisdiction. 1 Pomeroy, Eq. Jur. (3d ed.), § 243.

We are aware that there are cases holding that, where a statute has not been complied with by the officers of a municipal corporation, there is no liability. The injustice of such a rule is apparent where, as in this case, the county retains a needed improvement which it had the power to make had it pursued the mandate of the statute. In addition to the authorities referred to by Judge Fullerton, I cite as supporting our view: *Citizens' Central Nat. Bank v. Appleton*,

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216 U. S. 196; *O'Connor v. Stewart*, 19 La. Ann. 127; *Town of Nome v. Lang*, 1 Alaska 593.

I therefore concur.

CHADWICK, J., concurs in the result.

RUDKIN, C. J. (dissenting)—I concur in the judgment of reversal, but dissent from the conclusion of the majority of the court that the contractor is entitled to recover the reasonable value of the bridge constructed under its void contract. The abstract equity of the rule thus announced appeals to me, but the argument in its support is specious and unsound. One object of the statute is doubtless to enable the taxpayers to procure the construction of public works at a reasonable cost, as suggested in the majority opinion, but a far more important object is the prevention of favoritism, corruption, extravagance, and improvidence on the part of public officials. How will this latter object be accomplished if the majority opinion prevails? Counties can act only through their boards of county commissioners and other public officials, and if a contractor sues a county to recover the reasonable value of services performed or material furnished under a void contract, or if the county sues the contractor to recover any excess paid over such reasonable value, it is presuming entirely too much in favor of weak human nature to assume that the delinquent officials will be over-diligent or overzealous in proving that their unauthorized contract was improvidently or fraudulently entered into. The only safe rule to adopt, and the only rule that will at all safeguard the public interest, is the rule which prohibits a recovery in such cases on the contract or otherwise, and I am convinced that this rule is supported by the better reason and by the weight of authority. 1 Beach, Public Corp., § 698; 1 Dillon, Mun. Corp. (4th ed.), § 466; *Brady v. Mayor etc. of New York*, 16 How. Pr. 432; *Mayor etc. of Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4;

Addis v. Pittsburgh, 85 Pa. St. 379; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 99 N. W. 603; *Keane v. New York*, 88 App. Div. 542, 85 N. Y. Supp. 130.

Nor can I agree with the majority that this court has heretofore adopted a different rule. It seems to me that *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *State v. Pullman*, 23 Wash. 583, 63 Pac. 265, 83 Am. St. 836, and *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601, are directly opposed to the doctrine announced in the majority opinion. In the *Pullman* case, Dunbar, C. J., cited with approval the cases from New York and Maryland; and in the *Paul* case it was explicitly held that no implied promise arises from the receipt of benefits under a void contract, citing *Chippewa Bridge Co. v. Durand*, and *Keane v. New York*, *supra*, which fully support the views I have expressed.

For these reasons I am of the opinion that the county is entitled to recover the entire consideration paid, and in so far as the majority hold otherwise, I am constrained to dissent.

ON REHEARING.

[*En Banc*. March 22, 1911.]

PER CURIAM.—Upon a reargument of this case *en banc*, the judgment will be reversed for reasons assigned in the former opinion.

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[No. 8821. Department One. October 12, 1910.]

HAROLD G. STERN, *Appellant*, v. THE CITY OF SPOKANE
et al., Respondents.¹

MUNICIPAL CORPORATIONS—CONTRACTS—BIDS—DISCRETION—DECLARATION OF EMERGENCY. Where a city charter provides that if a city council shall "declare an emergency to exist," competitive bids for the letting of a contract may be dispensed with, the declaration of an emergency is a matter of legislative discretion which cannot be controlled or inquired into by the courts.

SAME—REJECTION OF BIDS—AWARD—DISCRETION. Where a charter provision requires a city council, before letting a contract, to advertise for competitive bids "reserving the right to reject any and all bids," a discretion is reposed in the council to let the contract to one it considers the "best" bidder; and in the absence of fraud or measurable pecuniary loss to the city showing a manifest abuse of discretion, the courts will not interfere with the rejection of the lowest bid, and an award to a higher bid, on pumping machinery requiring a specified proficiency, a technical and scientific knowledge being necessary to determine between the different manufactures offered.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered February 24, 1910, upon sustaining a demurrer to the complaint, dismissing an action for an injunction. Affirmed.

Samuel R. Stern, for appellant.

Fred B. Morrill and *Poindexter & Moore*, for respondents.

CHADWICK, J.—This action is prosecuted by appellant, who is a taxpayer in the city of Spokane, to restrain the city from accepting and paying for certain pumping machinery contracted for by its board of public works. The contract was awarded to the Allis-Chalmers Company. This company, like the Moran Engineering Company of which appellant is an officer and stockholder, is engaged in the business of contracting for machinery of the character mentioned. The Allis-Chalmers Company and Moran Engineering Com-

¹Reported in 111 Pac. 231.

pany had submitted bids on the 5th day of November, 1909, the Moran company being the lowest bidder. Thereafter a member of the board of public works, together with the city engineer, allowed the Allis-Chalmers Company to modify its bid, and were about to award a contract to it, when, upon advice of the city attorney that their proceedings were irregular, the board undertook to re-advertise for bids. Thereupon, at the solicitation of the board of public works, the city council passed a resolution declaring an emergency. This resolution was passed on the 15th day of December, 1901, and an advertisement for bids was inserted in the Evening Chronicle, a newspaper published on the evening of the 16th of December, and in the Spokesman-Review, a newspaper published on the morning of the 17th. The time for receiving bids was fixed in the advertisement for the hour of two o'clock p. m. on the 17th.

The later proposal differed from the one under which the original bids had been submitted, in that it provided that "the board of public works reserved the right to reject any and all bids submitted." Both the Allis-Chalmers Company and the Moran Engineering Company submitted bids on the 17th, the Moran Engineering Company being again the lowest bidder, and it is alleged in plaintiff's complaint that its bid conformed in every respect to the requirements of the advertisement and the specifications on file in the office of the city engineer, and that the bid of the Allis-Chalmers Company did not. Notwithstanding, the board let the contract to the Allis-Chalmers Company. The proposal for bids specified the following equipment: "Three 7,500,000 gal. multi-stage centrifugal pumps; three inductive motors, switch-board and connections." The bidders offered machinery of different manufacture; but, in the opinion of the bidders offering it, capable of doing the work required and coming within the equipments specified. The contention of the appellant is that, not only the letter of the law, but its spirit

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also, was violated by the action of the council and the board of public works.

The case may be reduced to two propositions of law: (1) Did the council have the power to declare an emergency; and (2) did the board of public works have a legal right to reject the bid of the Moran Engineering Company. We shall discuss these questions in their order.

While it is alleged that the board acted in fraud of the rights of the competing bidder, it does not follow as a legal proposition from the seemingly arbitrary conduct of the board that a presumption of fraud will arise; so that, however great the wrong may have been to the Moran Engineering Company or to plaintiff, he can have no remedy, provided the council and the board of public works acted within the law. The freeholders' charter of the city of Spokane provides:

"Sec. 98. When it shall be decided to do work by contract, they shall advertise at least ten days in two daily newspapers of the city for bids, accompanied by a certified check to an amount to be fixed by the board and named in said advertisement, not exceeding 10 per cent of the estimated cost of the work, reserving the right to reject any and all bids; provided, that in all contracts awarded in which the probable amount of expenditure would exceed \$1,000, the publication shall be made for a period not less than twenty days. If the mayor and city council shall by resolution declare an emergency to exist, the publication herein provided for may be dispensed with."

Acting under this provision of the charter, the council declared that an emergency did exist, and so far as the Moran Engineering Company is concerned, there was no prejudice, for it was not barred of its right to submit a competitive bid. But inasmuch as plaintiff prosecutes this action as a taxpayer and citizen, and not alone because of his interest in the Moran Engineering Company, we are willing to pass upon the merits of the question. All of the provisions of the law with reference to bids for public works are to be

found in the freeholders' charter. No constitutional question is involved. That which the legislature can give it can take away, and while we agree with counsel for appellant that, if the action of the council in declaring an emergency to exist be upheld, it practically nullifies those provisions of the charter which were designed to insure open competition in the matter of letting contracts for public works, we must nevertheless hold that it can be no concern of the courts if it does. If the legislature passes a wholesome law and at the same time creates a weapon to strike it down, it is still within the limit of its constitutional authority, as much so as if it had repealed an existing statute by express enactment. It is so in this case. The charter does not say that time may be dispensed with if an emergency exists, thus leaving the court free to inquire into the fact, but it says that the council shall have the power under any state of facts to declare an emergency. The rule in such cases is stated in *Dillon v. Whatcom County*, 12 Wash. 391, 41 Pac. 174, as follows:

"While it might appear to the court as a matter of public policy that great evil and inconvenience would result from an injudicious or mean policy on the part of the county commissioners, yet the discretion having been submitted to them by a vote of the people constituting themselves their agents to do this business for them, reposing confidence in their judgment and integrity, the people must abide by their own action in selecting these agents and the courts are powerless to relieve them from the results of their own bad judgment in such selections."

This court has so frequently held that legislative discretion in matters falling within the constitutional limit of legislative authority will not be controlled by the courts, in the absence of positive fraud, that a citation of the authorities through which this principle is threaded will be sufficient without further discussion. *Ponischil v. Hoquiam Sash etc. Co.*, 41 Wash. 303, 83 Pac. 316; *Kakeldy v. Columbia & Puget Sound R. Co.*, 37 Wash. 675, 80 Pac. 205; *Frederick*

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v. Seattle, 13 Wash. 428, 43 Pac. 364; *Selde v. Lincoln County*, 25 Wash. 198, 65 Pac. 192; *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259; *Nichols v. School District*, 39 Wash. 187, 81 Pac. 325; *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757; *Heffner v. Board of County Com'rs*, 16 Wash. 278, 47 Pac. 430; *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 Pac. 201, 28 L. R. A. 340.

Then, too, the council has the same right to declare, and by analogy, its act can be sustained by reference to the power of the legislature to declare, an emergency, and thus put laws in effect before the time they would otherwise become effective under the constitution. It is not that an emergency in fact exists, but that the legislature or other legislative body having the power has said that it is so. When it has, "the courts will not inquire into it nor entertain any question of its sufficiency." Sutherland, Stat. Const., § 108.

This case is to be distinguished from *Green v. Okanogan County*, ante p. 309, 111 Pac. 226, wherein we held that no emergency existed which would warrant the board of county commissioners in letting a contract without inviting open competition. The provision of the law there construed (Laws 1903, p. 324, § 15), is that all work shall be let to the lowest bidder, "except in case of emergency;" but no authority is given the board of county commissioners to declare the emergency as a matter of legislative discretion, thus leaving the court free to inquire into the facts. And also from the case of *Goshert v. Seattle*, 57 Wash. 645, 107 Pac. 860, where the charter provision was mandatory that the contract should be let to the lowest bidder.

The answer to the second proposition—that is, that the Moran Engineering Company was the lowest bidder and therefore entitled to the contract, is answered by the charter itself. It provides explicitly that the board shall reserve the right to reject any and all bids, and in the absence of a showing of fraud or such a pecuniary loss to the city, to be determined by some measurable standard, as to

indicate a manifest abuse of discretion, the courts have no power to substitute their judgment for that of the board. It is a recognized fact that many of the materials and equipments now in general use and recognized by competent authorities to be the best adapted to modern uses and conveniences are controlled by patents, so that the license contained in § 98 of the freeholders' charter is not unusual, and unless the charter provision is mandatory and clearly intended to apply, the courts will refuse to control the discretion of the city officials in such cases. The words "reserving the right to reject any and all bids" are equivalent in law to saying that the board may let the contract to the one to whom it considers the best bidder. The rule in such cases is that the quality of the materials to be furnished, as well as the price bid, may be taken into consideration in determining which of the several bids is the lowest. 28 Cyc. 663; *Trapp v. Newport*, 25 Ky. Law 224, 74 S. W. 1109; *Barber Asphalt Co. v. Gaar*, 24 Ky. Law 2227, 73 S. W. 1106; *People ex rel. Assyrian Asphalt Co. v. Kent*, 160 Ill. 655, 43 N. E. 760; *Becker v. Roth* (Ky.), 115 S. W. 761; *Anderson v. Public Schools*, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707.

In the latter case it was said:

"It is indeed asserted that the defendant rejected the plaintiffs' bid 'without cause, arbitrarily and capriciously, through favoritism and bias.' But, if the defendant had the absolute right to reject any and all bids, no cause of action would arise to plaintiffs because of the motive which led to the rejection of their bid. The right to reject the bids was unconditional. Defendant was entitled to exercise that right for any cause it might deem satisfactory, or even without any assignable cause. Whatever its rules or practice as to the acceptance of bids may have been, plaintiffs' rights cannot be justly held to be greater than those conferred by the published advertisement on which their bid was made. That advertisement was not an offer of a contract, but an offer to receive proposals for a contract."

In this case the specifications were of necessity elastic, calling for pumps and equipment calculated to raise a certain

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quantity of water. Bidders necessarily offered machinery of different manufacture, and for us to say in behalf of an unsuccessful bidder, considering only the difference in the bids in connection with the whole price paid, that his machinery is better calculated to do the work required by the board, would be to substitute our judgment for that of the municipal authorities in a matter requiring a technical and scientific knowledge, and in a case expressly reserved by the people of Spokane for themselves. It in no way affects the law as we have declared it to say that appellant may be correct in his contention that the board of public works may have been partial to the Allis-Chalmers Company, and arbitrarily rejected the bid of his company. But this it has the power to do, and if it be a fault of the law, the people who made the law will have a present opportunity to correct it. The court will take judicial notice that the city of Spokane is at the present time considering a new freeholders' charter.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8500. *En Banc*. October 13, 1910.]

MARY H. MOLLOY, *Appellant*, v. UNION TRANSFER, MOVING
& STORAGE COMPANY, *Respondent*, MRS. M. BRADLEY
et al., *Defendants*.¹

JUDGMENTS—VACATION—IRREGULARITY—NOTICE OF PROCEEDINGS. It is discretionary for the trial court to vacate a judgment which was entered against a defendant, who had appeared by the service of a demurrer, without the framing of any issues, or notice of the trial, or any claim or entry of default, in view of Rem. & Bal. Code, § 241, entitling a defendant after appearance to notice of all proceedings.

¹Reported in 111 Pac. 160.

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JUDGMENT—VACATION—ACTIONS—DISMISSAL. Upon the vacation of a judgment for the want of jurisdiction over the person of defendant, the action is still pending, and it is error to dismiss the same, the time for the service of process not having expired.

JUDGMENT—VACATION —PROCESS —SERVICE—PROOF—SUFFICIENCY—APPEARANCE—AUTHORITY. It is error to vacate a judgment and dismiss the action for want of jurisdiction over the person of the defendant, where the affidavit of the deputy sheriff showed service on the defendant; and a demurrer was served by an attorney purporting to represent the defendant, and neither the attorney nor the secretary-treasurer of the defendant explicitly denied the authority of the attorney to represent the defendant.

APPEAL—FINAL ORDERS—VACATION OF JUDGMENT. An order vacating a judgment is not appealable as a final order.

RUDKIN, C. J., GOSE, and PARKER, JJ., dissent.

Appeal from a judgment of the superior court for King county, Kennan, J., entered October 15, 1908, dismissing an action for damages, after vacating a default judgment therein for the plaintiff for want of jurisdiction over the person of the defendant. Reversed.

John T. Casey (Milo A. Root, of counsel), for appellant.
E. M. Farmer, for respondent.

CROW, J.—Plaintiff began this action against the defendants, to recover damages for the breach of a lease and for the destruction of a lien given for its security. Plaintiff had leased a certain apartment house to defendant Bradley, for a definite term, at a stipulated monthly rental, and as security for the rent it was agreed in the lease, which was in writing, that plaintiff should have a mortgage lien on the furniture belonging to the lessee. But two months' rent was paid. Other breaches of the lease were alleged, but it is unnecessary to discuss them. Defendant Bradley undertook to move her furniture out of the leased apartment, and it is alleged that she employed the Owl Transfer & Storage Company and the Union Transfer, Moving & Storage Company to transfer her goods. It is further alleged that the

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transfer companies were notified of the interest of the plaintiff and her claim of lien upon the furniture, but that in disregard of her rights, they assisted the defendant Bradley in the removal, so that her lien has been lost and destroyed. The court's minutes show that a general demurrer, purporting to have been urged on behalf of all the defendants, was overruled by the court. This demurrer was not filed by the attorney who had served it upon the plaintiff's counsel and who at that time represented the defendant Bradley, but the copy served was filed by the attorney for the plaintiff in resistance to a motion to which we shall presently allude. An answer was thereafter filed by the same attorney on behalf of the defendant Bradley only.

Conceding the demurrer to have been an authorized appearance on behalf of all the defendants, it was not filed prior to judgment, and the record before us shows that no further appearance was made by the defendant Union Transfer, Moving & Storage Company, nor was any further issue of law or fact framed between it and the plaintiff. Thereafter the cause came on for trial before the court without a jury on the issues of fact raised between the plaintiff and the defendant Bradley. Findings of fact, conclusions of law, and judgment were entered in general terms against "the defendants." The name of the defendant Bradley only, appears in the findings. The term "the defendants" only appears in the judgment, in which no defendant's name is mentioned, save in the caption or title of the cause. It does not appear from the record that any notice of trial, of application for judgment, of the entry of judgment, or of any of the proceedings was served upon the defendant Union Transfer, Moving & Storage Company, or that it had any knowledge of the judgment until execution was issued thereon. The company then appeared by another attorney and moved to set aside, vacate, and declare null and void the judgment theretofore rendered against it, for the reason that the court had failed to obtain jurisdiction over the defendant and that the judg-

ment had been obtained by fraud. After a hearing, the court set aside the judgment and declared it to be null and void. After twenty days a claim for default was made by plaintiff. This was met by a motion to dismiss as to the Union Transfer Company. The default was denied, and the motion to dismiss was allowed. Plaintiff has appealed.

The reasons for the order of dismissal are not disclosed by the record, although suggested in the briefs. The court probably proceeded upon the theory that no service of the summons and complaint had been made upon the respondent company. In vacating the judgment the trial judge may have proceeded upon the theory that it was void because no service of the summons and complaint had been made on the respondent company. Although proof of such service was made and filed after judgment and before the hearing of the motion for its vacation, we nevertheless conclude that the trial judge acted well within his powers and discretion when he vacated the judgment which had been entered against the respondent company, without the framing of any issue of fact between it and the appellant, without any notice to it that an application for judgment would be made, and without any claim for or entry of an order of default following respondent's failure to plead. Rem. & Bal. Code, § 241, provides that: "After appearance a defendant is entitled to notice of all subsequent proceedings." This right remains with a defendant who has appeared, until upon motion and notice an order of default had been properly claimed and entered against him. The judgment in this action was irregularly entered without proof of service of any notice. The respondent did not learn of its existence until execution was issued and the time for an appeal had expired. The judgment did not mention the respondent's name, but ran against "the defendants," a form of expression which misled the attorney who at the trial appeared on behalf of the defendant Bradley, and whose affidavit shows that he understood judgment was to be entered against her only. Since the

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judgment was thus obtained and entered, we do not think it should now be reinstated by order of this court after the trial judge has exercised his discretion in vacating and setting it aside.

We cannot, however, indorse the opinion of the learned trial judge that the case should be dismissed. The order vacating the judgment left the case open and pending, and if no service had been obtained, it was the privilege as well as the right of the plaintiff to perfect the service or make a new service as the necessities of the case demanded.

"The court having vacated the original judgment, on the ground, we must suppose, that no service of process had ever in fact been made, correctly treated the suit as still pending." *Kelly v. Harrison*, 69 Miss. 856, 12 South. 261.

See, also, *Meyer Brothers v. Whitehead*, 62 Miss. 387; *Aetna Life Ins. Co. v. Board of Com'rs. Hamilton County*, 79 Fed. 575; *Freeman*, Judgments (4th ed.), 104.

It is not within the power of a court having jurisdiction of the subject-matter to dismiss an action for the want of service, unless it appears that the time when a valid service can be made has expired by limitation or otherwise. Respondent relies upon the case of *Noerdlinger v. Huff*, 31 Wash. 360, 72 Pac. 73. But that case is not in point. Judgment had been entered upon the dissolution of a temporary restraining order. It is there said:

"It is urged by appellant that it was error to enter final judgment until after final hearing of the cause. As a general proposition, the contention is correct, but the so-called motion to dissolve contains recitals which are the equivalent of a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action against the respondent."

No leave was asked to amend, and the court entered a judgment of dismissal. This was approved. But if the rule were otherwise than as we have found it to be, we think the court erred in holding that it had not acquired jurisdiction of the Union Transfer Company. As against the ruling of

the court on the demurrer, which ran against all parties defendant, the form of the demurrer as supplied when the hearing on the motion to vacate the judgment was had, and the affidavit of the deputy sheriff saying that service was in fact made, we have only the denial of the present attorney for respondent, who admittedly had no personal knowledge of any of the proceedings prior to the time the motion to vacate the judgment was made. He states that the attorney who is said to have made the general appearance acted without authority. Neither the secretary-treasurer of respondent, nor the attorney whose appearance is questioned, explicitly denied his authority, although we grant that such is the impression sought to be conveyed. The whole record being before us, we find that the court had acquired jurisdiction of the person of respondent, and the action should not have been dismissed for that reason.

It is also urged that the appeal should be dismissed. We have said enough to show that the order vacating the judgment was not final. It is so well settled that an appeal will not lie from an order vacating or setting aside a judgment unless it is final, not in form but in law, that a citation of the authorities is unnecessary.

The judgment of dismissal is reversed, with directions to the lower court to reinstate the action, permit an answer on the part of respondent, and allow the cause to be tried upon the issues when made.

DUNBAR, MOUNT, CHADWICK, and FULLERTON, JJ., concur.

RUDKIN, C. J. (dissenting)—I dissent. The motion to vacate the original judgment was based on the following grounds, specifically set forth in the motion:

“(1) That said judgment is void for failure of the above entitled court to obtain jurisdiction over said defendant.

“(2) That the said judgment was obtained by a fraud practiced by the successful party, plaintiff herein, by neglect-

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ing and failing to serve said defendant with the summons and complaint in said action."

It will thus be seen that want of jurisdiction in the court to render the judgment was the sole ground of the motion to vacate, and when that question was resolved in favor of the jurisdiction, the motion to vacate failed.

The judgment should be reversed, with directions to deny the motion to vacate and to reinstate the original judgment.

GOSE and PARKER, JJ., concur with RUDKIN, C. J.

[No. 8859. Department Two. October 13, 1910.]

KENNEDY DRUG COMPANY *et al.*, Respondents, v. FRANK W. KEYES *et al.*, Appellants.¹

CORPORATIONS—RECEIVERS—GROUNDS—FRAUD OF PROMOTER—STOCK-HOLDERS. A receiver is properly appointed for a corporation where it appears that a promoter, through fraudulent representations, obtained a drug business and property of the other stockholders of the value of \$33,000, and conveyed the same to the corporation in full payment of stock of the par value of \$100,000, two-thirds of which he issued to himself without paying anything therefor, and in violation of his agreement to sell the same for the benefit of the corporation, by means of which he absolutely controls the corporation, and secured heavy profits to himself for which he refuses to account, and that he is about to bond the company, and threatens the corporation with insolvency by ill management.

Appeal from an order of the superior court for King county, Main, J., entered March 18, 1910, appointing a receiver for a corporation, after a hearing before the court. Affirmed.

McCafferty, Robinson & Godfrey, for appellants.

William R. Bell and Higgins, Hall & Halverstadt, for respondents.

¹Reported in 111 Pac. 175.

Crow, J.—This is an appeal from an order appointing a receiver in three consolidated actions prosecuted against Frank W. Keyes, Bessie Keyes, his wife, and F. W. Keyes Drug Company, a corporation, by Kennedy Drug Company, a corporation, George E. Trumball and Walter Evers and others, as plaintiffs, all of whom are, or claim to be, stockholders in the defendant corporation. A consideration of the issues and proofs in the Kennedy Drug Company action will be controlling.

The plaintiff in that action, in substance, alleged that Frank W. Keyes had fraudulently obtained control of, and claimed the ownership of, nearly two-thirds of the capital stock of the defendant corporation; that he had caused such stock to be issued in his own name; that he claimed the same had been fully paid; that he had not, nor had any other person, paid any consideration to the corporation therefor; that by means of such stock he had acquired control of the corporation; that he had elected himself and two nominal stockholders as its trustees; that the trustees were under his complete domination; that the corporation was engaged in the drug business in the city of Seattle; that it was successor to and vendee of the plaintiff, the Kennedy Drug Company; that Keyes was so conducting the corporation as to dissipate its assets, destroy its business, defraud the plaintiff, incur heavy indebtedness, and cause the corporation to become insolvent. The plaintiffs in all three of the actions moved for the appointment of a receiver. Their motions, after notice, were heard on affidavit, exhibits, and other evidence. The trial judge made an order appointing a receiver, and the defendants have appealed.

The allegations above mentioned and others contained in the complaints are, if sustained, sufficient to support the order. From the evidence we find the following facts: The respondent Kennedy Drug Company was the owner of a stock of goods, a going drug business, certain fixtures, and a leasehold estate in Seattle. About January 28, 1909,

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after considerable negotiations, it agreed to turn the same over to the appellant Frank W. Keyes, then in its employ, at a valuation of \$33,000, \$10,000 cash and \$23,000 in stock of an existing corporation having an authorized capital stock of \$50,000, the vendor to pay all outstanding debts. On or about February 23, 1909, Frank W. Keyes and two others formed the appellant corporation F. W. Keyes Drug Company, with a capital stock of \$100,000, divided into 1,000 shares of the par value of \$100 each. After this corporation had been formed, its stock subscribed but not paid, its organization completed by the adoption of by-laws and election of trustees of whom Keyes was one, after certain declarations had been made upon its minutes at a meeting held on March 3, 1909, relative to stock that was to be delivered to the respondent, and after Keyes had agreed to transfer the former business and assets of the respondent Kennedy Drug Company to the new corporation, at a valuation of \$100,000 in full payment of its capital stock, Keyes, without informing respondent that the new corporation had been then organized, induced it to consent that the business and assets of the Kennedy Drug Company might be turned over by him to a new corporation which he then represented was yet to be formed. He also agreed that respondent should receive \$23,000 par value of its preferred stock and \$10,000 in cash, with the further agreement and representation that the remainder of the \$100,000 of the capital stock of the new corporation should be sold to investors for cash at par; that all the proceeds of such sales should then be used by the new corporation in purchasing other drug stores and extending its business; and that respondent's preferred stock should also be sold at par and the proceeds thereof paid to it. Thereupon Keyes caused the business and assets of the respondent to be transferred to the new corporation in full payment of all of its capital stock at the par value of \$100,000, the stock to be issued to him.

After deducting from the \$23,000 the debts of the respond-

ent corporation which the new corporation assumed, Keyes caused 176 shares of so-called preferred stock of the par value of \$17,600, to be issued to the respondent and delivered to a third party to be held and sold for respondent's benefit. It was never sold. Keyes then returned fifty shares to the treasury of the new corporation, to be placed on the market and sold at par to secure funds to aid in payment of debts. The \$10,000 cash was paid to respondent from money then borrowed by the new corporation and from the business itself. A few shares were sold to other parties. Other transfers and changes were made, which finally resulted in seventy-five shares of the capital stock being left in the treasury. But when the various manipulations, transfers, and deals which Keyes carried on or directed had been completed, he held 611 shares of the stock of the new corporation in his name, which he claimed to own and for which he is not shown to have paid a single dollar, the same being stock which, under his agreement with respondent, should have been sold to investors at par for cash to procure funds for the purchase of other drug stores and the increase of the business. Keyes immediately took personal charge of the business, caused the corporation to borrow large sums of money at high rates of interest, negotiated for an issue of \$20,000 of bonds to be secured by the corporation assets, and as respondent claims, was so conducting the business as to threaten insolvency. When respondent learned these facts it demanded an accounting, and also demanded that Keyes either pay for or return to the corporation the 611 shares of stock so obtained and held by him. Upon his refusal and the refusal of the appellant corporation to comply with these demands, the respondent commenced one of these actions to compel such accounting and return of stock, and moved for the appointment of a receiver.

From this statement it will be seen that the appellant Keyes has obtained complete control of the corporation, holding nearly two-thirds of its capital stock for which he paid noth-

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ing. It is further shown that he caused a subservient board of trustees to elect him president, to make him general manager for a term of five years without power of revocation, at a salary of \$2,500. He insists that he paid value for his stock, but he fails to produce any satisfactory evidence of that claim. There is no showing that any property or assets were ever transferred to, or received by, the new corporation, other than the business and assets of the Kennedy Drug Company, on which it and Keyes had placed a valuation of \$33,000. No effort seems to have been made to sell respondent's stock, nor was the respondent represented on the board of trustees.

Respondent charges that F. W. Keyes, as manager, had contracted heavy obligations by causing the corporation to borrow money at a high rate of interest, a charge sustained by the evidence. Other irregular acts have been shown, but we think a sufficient statement has been made to disclose the manipulation, attitude and conduct of appellants. Keyes, as a promoter of the new corporation, has obtained for himself, without consideration, large profits in the form of stock held by him, which he votes and which places him in absolute control of the corporation. He has reaped such profits by the use of property of respondent, to its disadvantage and prejudice, and by the violation of his promise to sell, for the benefit of the new corporation and its business, the identical stock which he now holds and claims to own. He did not sell to the corporation, at a fair valuation, any property which he owned or to which he held title. On the contrary, he used respondent's property, not only to procure the money and stock which respondent received, but also to obtain for himself a much greater amount of stock to which he now asserts ownership. He has thus secured for himself heavy profits not disclosed to respondent, which he was not entitled to obtain without its consent and which he now holds and uses to its prejudice.

Appellants insist that respondent knowingly consented and

agreed to accept the stock consideration which it has received from the appellant corporation, and that respondent did not contract for, or require any sale of, the stock now held by Keyes. No better response can be made to this contention than to quote the statement of the trial judge, who said:

"When Kennedy [respondent's agent] turned this property over to Keyes to go into this corporation, it is inconceivable that it was in the mind of Kennedy, at least, at that time, that a corporation for \$100,000 should be formed and that he should have 176 shares for his \$17,600 worth of property and that Keyes would have 611 shares for no assets whatever. Keyes now has the absolute control of this corporation. While the capital stock is a thousand shares, he owns 611. There are 75 shares in the treasury. There are 15 shares which have been retired, according to their theory of it, which would reduce it to 915 shares, or 925 shares, it makes no difference. That being true, Keyes now owns 611 shares or two-thirds, over two-thirds of the voting capital stock of that concern. The board of trustees is absolutely under his domination. He can call a meeting of the stockholders and discharge every member of the board of trustees, under the statute, by two-thirds vote. Kennedy's property has now come under the absolute domination of Keyes. He has the power to bond this property for \$20,000, put it out of existence and deprive Kennedy of anything more than he might get pro rata on his stock as it now stands. I do not believe that the law ever intended in dealing with corporations that one man should get the control of another man's property in the method in which this was obtained and retain dominion over it."

In *Mangold v. Adrian Irrigation Co.*, ante p. 286, 111 Pac. 173, recently decided by this court, we held that promoters of a corporation who in a sense are trustees for, and owe an obligation of good faith to, investing stockholders, and who themselves have no substantial investment in the enterprise, cannot be permitted to obtain profits to themselves without the knowledge or consent of investing stockholders who have furnished the only financial support or assets which the promoted corporation possesses. A

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statement of the facts disclosed by the evidence is sufficient to sustain the order appointing the receiver. Respondents demanded an accounting, and a surrender of the stock held by the appellant Keyes, both of which were refused by Keyes and the appellant corporation. Respondents claim that Keyes is without financial responsibility. The evidence fails to show that he has any property, other than the stock in dispute in this action which he now claims. His management threatens the corporation with insolvency. The trial court so found, and the evidence is sufficient to support that finding. Appellants contend that a receiver should not be appointed for the corporation, because it is a going concern and is solvent. Its solvency is denied. But conceding it to be a going concern, evidence has been introduced to show that the appellant Keyes has obtained complete control by means of 611 shares of stock, which he has caused to be issued to himself without payment or consideration; and that, being thus in control, he is so conducting the business as to threaten insolvency. If there was any substantial evidence that he had paid value for and owned the stock now held by him in what he claims is a going and solvent corporation, a different question would be presented, but no such showing has been made.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, and PARKER, JJ., concur.

[No. 8838. *En Banc*. October 14, 1910.]

C. B. BUSSELL *et al.*, *Respondents*, v. E. W. ROSS, *as*
Commissioner of Public Lands et al., *Appellants*.¹

PUBLIC LANDS—TIDE LANDS—FILLS—CERTIFICATES—CONTRACT—INJUNCTION. Under Rem. & Bal. Code, § 8103, providing that the commissioner of public lands shall issue certificates on contracts for the filling of tide lands showing the actual cost of the fill, which certificates shall when filed be a lien upon the lands for the cost specified in the certificate, with fifteen per cent additional, with the proviso that the lien shall not be operative for an amount exceeding the cost of the work as stated in the contract, and § 8107, providing that the cost of bulkheads shall be apportioned by the commissioner to all lands benefited thereby in addition to the cost of the fill, and under a contract for filling tide lands which provides that the entire cost of the work "including the cost of the bulkheads" shall not exceed sixteen cents per cubic yard for each and every yard of earth put upon each tract of land, the lands are liable only for the maximum of sixteen cents per cubic yard fixed by the contract, except where additional costs of bulkheads are approved by the governor, pursuant to a clause in the contract; and where the commissioner is threatening to issue certificates in excessive amounts to include distributed street and alley fill and additional bulkheads without the governor's approval, injunction will issue to restrain such action (RUDKIN, C. J., CHADWICK, GOSE, and FULLERTON, JJ., dissenting).

INJUNCTION—PARTIES—PUBLIC LANDS—INTEREST OF STATE—TIDE LAND FILLS. The state is not a necessary party to an action to enjoin the commissioner of public lands from issuing excessive lien certificates on a contract for filling tide lands, the state having sold the lands and not being liable for the price of the fills or having any interest in the matter except as benefited by the waterway, as to which no relief was sought; the whole controversy being between the contractors and the owners of the land.

Appeal from an order of the superior court for King county, Main, J., entered December 8, 1909, granting an injunction *pendente lite* after a hearing before the court. Affirmed.

The Attorney General, M. B. Sachs, Roberts, Battle, Hulbert & Tennant, and Hughes, McMicken, Dovell &

¹Reported in 111 Pac. 165.

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Citations of Counsel.

Ramsey, for appellants. The law invests the commissioner with a discretion in this matter that will not be reviewed by the courts. *Scholpp v. Forrest*, 11 Wash. 640, 40 Pac. 133; *Mississippi Valley Trust Co. v. Hofus*, 20 Wash. 272, 55 Pac. 54; *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845; *State ex rel. Bussell v. Bridges*, 30 Wash. 268, 70 Pac. 506; *State ex rel. Smith v. Forrest*, 8 Wash. 610, 36 Pac. 686, 1120; *State ex rel. Megler v. Forrest*, 13 Wash. 268, 43 Pac. 51; *State ex rel. White v. Board of State Land Commissioners*, 23 Wash. 700, 63 Pac. 532; *McNaught-Collins Imp. Co. v. Atlantic & Pacific Pile & Timber Preserving Co.*, 36 Wash. 669, 79 Pac. 484; *Polson v. Callvert*, 38 Wash. 614, 80 Pac. 815; *State ex rel. Pelton v. Ross*, 39 Wash. 399, 81 Pac. 865. The courts will not interfere in advance with the exercise of such a function imposed upon a public officer. 2 High, Injunctions (4th ed.), §§ 1311, 1326; *Dwelling-House Ins. Co. v. Wilder*, 40 Kan. 561; *Troy v. Commissioners of Doniphan County*, 32 Kan. 507, 4 Pac. 1009. Neither injunction nor mandamus will lie to control the exercise of judgment or discretion of such an officer, whose decision is judicial in its nature. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316; *Lane v. Anderson*, 67 Fed. 563; *McCauley v. Kellogg*, 2 Woods 13; *Mooers v. Smedley*, 6 Johns Ch. 28; *McChord v. Louisville & N. R. Co.*, 183 U. S. 483; *Enterprise Savings Ass'n v. Zumstein*, 64 Fed. 837; *Bates v. Taylor*, 87 Tenn. 319, 11 S. W. 266, 3 L. R. A. 316; *Morris & Whitehead v. Williams*, 23 Wash. 459, 63 Pac. 236. The commissioner cannot be prejudged or enjoined from judging at all. *United States v. Arredondo*, 6 Pet. 691; *Philadelphia etc. R. Co. v. Stimpson*, 14 Pet. 448; *Decatur v. Paulding*, 14 Pet. 497, 513; *Foley v. Harrison*, 15 How. 433, 445; *Bartlett v. Kane*, 16 How. 263; *Belcher v. Linn*, 24 How. 508, 516; *Shepley v. Cowan*, 91 U. S. 330; *Vance v. Burbank*, 101 U. S. 514; *Quimby v. Conlan*, 104 U. S. 420; *Baldwin v. Stark*, 107 U. S. 463; *Carr v. Fife*, 156 U. S. 494; *Bishop of Nesqually v.*

Gibbon, 158 U. S. 155, 166; *Burfenning v. Chicago etc. R. Co.*, 163 U. S. 321; *Bates & Guild Co. v. Payne*, 194 U. S. 106; *United States v. Leng*, 18 Fed. 15; *United States v. McDowell*, 21 Fed. 563; *United States v. Doherty*, 27 Fed. 730; *Bear v. Luse*, Fed. Case, No. 1,179; *Tilden v. Sacramento County*, 41 Cal. 68; *Colusa County v. De Jarnett*, 55 Cal. 373; *Stewart v. Sutherland*, 93 Cal. 270; *Howland v. Eldredge*, 43 N. Y. 457; *People ex rel. Francis v. Common Council*, 78 N. Y. 33, 34 Am. Rep. 500; *Ferry v. Street*, 4 Utah 521, 7 Pac. 712, 11 Pac. 571; *Grant v. Oliver*, 91 Cal. 158, 27 Pac. 596, 861; *Johnson v. Bridal Veil Lumbering Co.*, 24 Ore. 182, 33 Pac. 528; *Kitchel v. Board of Com'rs of Union County*, 123 Ind. 540, 24 N. E. 366; *Sheidley v. Lynch*, 95 Mo. 487, 8 S. W. 434; *Kinney v. Degman*, 12 Neb. 237, 11 N. W. 318; *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622; *Leech v. Rauch*, 3 Minn. 448; *State v. Bachelder*, 5 Minn. 223, 80 Am. Dec. 410; *State v. Stevens*, 5 Minn. 521; 23 Am. & Eng. Ency. Law (2d ed.), 372; 29 Cyc. 1433. Where there can be no injunction against the commissioner, there can be none against the other defendants. *New Orleans Water Works Co. v. New Orleans*, 164 U. S. 171. This is an action against the state, and the court had no jurisdiction because not commenced in Thurston county. Rem. & Bal. Code, § 886; *McWhorter v. Pensacola & A. R. Co.*, 24 Fla. 417, 5 South. 129, 12 Am. St. 220, 2 L. R. A. 504; *Reagan v. Farmers Loan and Trust Co.*, 154 U. S. 362, 389; *Peebles v. Byrd*, 98 Ga. 688, 25 S. E. 677; *Hagood v. Southern*, 117 U. S. 52; *Cunningham v. Macon etc. R. Co.*, 109 U. S. 446, 452. The plaintiff has an adequate remedy at law. *Mississippi Valley Trust Co. v. Hofius*, *supra*; *Wilkes v. Hunt*, 4 Wash. 100, 29 Pac. 830; *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067.

Harold Preston and *George E. de Steiguer*, for respondents, contended, among other things, that a court of equity has peculiar jurisdiction of actions instituted to prevent by

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Citations of Counsel.

injunction the casting of wrongful clouds upon the title to real property. 4 Pomeroy, Equity Jurisprudence (3d ed.), §§ 1845, 1860; *Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S. 368; *Board of Liquidation v. McComb*, 92 U. S. 531; *Hemingson v. United States Fidelity & Guaranty Co.*, 208 U. S. 404. The contemplated proceeding under this statute is *ex parte*. *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845. Where the decision of a matter of fact is committed to an officer, his decision will not be regarded as conclusive unless it is so provided in the act or contract. *Van Horne v. Watrous*, 10 Wash. 525, 39 Pac. 136; *Mercantile Trust Co. v. Hensey*, 205 U. S. 298; *Central Trust Co. v. Louisville etc. R. Co.*, 70 Fed. 282; *Benson v. Miller*, 56 Minn. 410, 57 N. W. 943; *Memphis etc. R. Co. v. Wilcox*, 48 Pa. St. 161; *Adlard v. Muldoon*, 45 Ill. 193; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449. The decision of the commissioner is subject to review by the court. *Mississippi Valley Trust Co. v. Hofius*, 20 Wash. 272, 55 Pac. 54; *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, *supra*. Injunction is the proper remedy to prevent threatened or anticipated illegal action on the part of public officers in exercise of their authority or jurisdiction by reason of misconstruction of the law or contract. *Marquez v. Frisbie*, 101 U. S. 473; *Northern Pac. R. Co. v. Colburn*, 164 U. S. 383; *Lee v. Johnson*, 116 U. S. 48; *Lindsay v. Hawes*, 2 Black 554; *McClung v. Silliman*, 6 Wheat. 598; *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46; *Minnesota v. Bachelder*, 1 Wall. 109; *Moore v. Robbins*, 96 U. S. 530; *Samson v. Smiley*, 13 Wall. 91; *Johnson v. Towsley*, 13 Wall. 72, 87; *Garland v. Wynn*, 20 How. 6; *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 394; *Missouri, K. & T. R. Co. v. Missouri Railroad and Warehouse Commissioners*, 183 U. S. 53; *Ex parte Young*, 209 U. S. 123; *Smyth v. Ames*, 169 U. S. 466, 518; *Scottish Union & National Ins. Co. v. Herriott*, 109 Iowa 606, 80 N. W. 665, 77 Am. St. 548; *Kruger v. Life &*

Annuity Ass'n, 106 Cal. 98, 39 Pac. 213; *Galveston etc. R. Co. v. Davidson* (Tex. Civ. App.), 93 S. W. 436, 445; *Illinois Life Ins. Co. v. Prewitt*, 123 Ky. 36, 93 S. W. 633; *Blanton, Com'r v. Southern Fertilizing Co.*, 77 Va. 335; *Noble v. Union River Logging R. Co.*, 147 U. S. 165; *Carroll v. Safford*, 3 How. 440; *Lyne v. Jackson*, 1 Rand. 114; *People ex rel. Alexander v. District Court*, 29 Colo. 182, 68 Pac. 242; *Kaufman County v. McGaughey*, 3 Tex. Civ. App. 671, 21 S. W. 261; *Bond v. Mayor and Common Council of Newark*, 19 N. J. Eq. 376; *Schumm v. Seymour*, 24 N. J. Eq. 143, 147; *Marbury v. Madison*, 1 Cranch. 137; *Galveston etc. R. Co. v. Henry & Dilley*, 65 Tex. 685; *Alton etc. R. Co. v. Northcott*, 15 Ill. 49; High, Injunctions, §§ 1308, 1309; Pomeroy, Equity Jurisprudence, § 1345. The commissioner was a proper party to effectuate the relief decreed. *Guy v. Hermance*, 5 Cal. 73, 63 Am. Dec. 85; *Tucker v. Kenniston*, 47 N. H. 267, 93 Am. Dec. 425; *Groves v. Weber*, 72 Ill. 606; *O'Hare v. Downing*, 130 Mass. 16; *People ex rel. Alexander v. District Court*, *supra*. A parallel case is *Bond v. Mayor and Common Council of Newark*, *supra*. This is not an action against the state. *Reagan v. Farmers' Loan and Trust Co.*, Missouri, K. & T. R. Co. v. Missouri Railroad and Warehouse Commissioners, *Ex parte Young*, *Smith v. Ames*, *Scottish Union & National Ins. Co. v. Herriott*, *Kruger v. Life & Annuity Ass'n*, *Galveston etc. R. Co. v. Davidson*, *Illinois Life Ins. Co. v. Prewitt*, and *Blanton, Com'r v. Southern Fertilizing Co.*, *supra*. The beneficial interest of the state does not make it a party to the suit. *Andrews v. King County*, 1 Wash. 46, 23 Pac. 409, 22 Am. St. 136; *State ex rel. Smith v. Ross*, 42 Wash. 439, 85 Pac. 29; *Scholpp v. Forrest*, 11 Wash. 640, 40 Pac. 133; *Wilkes v. Hunt*, 4 Wash. 100, 29 Pac. 830; *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067; *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37; *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606. The lien to be claimed is excessive. *Scholpp v. Forrest* and *Mississippi Valley Trust Co. v. Hofius*, *supra*.

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Opinion Per MOUNT, J.

MOUNT, J.—The respondents brought this action to restrain E. W. Ross, commissioner of public lands, from issuing, and the other defendants from receiving, placing of record, transferring or negotiating, certificates on tide land fills upon certain described lands owned by the respondents, for an amount in excess of the actual cost of the work, with fifteen per cent added, and in no event to exceed in amount the number of cubic yards filled on any lot, multiplied by sixteen cents. The trial court issued an injunction *pendente lite* upon a preliminary showing, and the defendants have appealed from that order.

The complaint in the case alleges, in substance, the execution of the contracts under the act of 1893, between the state and Eugene Semple, for the excavation of certain waterways upon tide lands in Seattle, and the filling of adjacent lands, which contracts have been assigned to the appellant Lake Washington Waterway Company. The complaint also alleges various extensions of the time of completing work under the contracts, and the purchase from the state by plaintiffs of certain tide lands covered by the contracts. The complaint also alleges that, by virtue of the contracts, fills have been made upon certain of the lands now owned by the plaintiffs; that under the law and the contracts, the said land commissioner is authorized to issue certificates representing the cost of such fills, and such certificates, when filed in the office of the county auditor of King county, become liens upon the land for the amount named in the certificates; that the land commissioner has in the past issued certificates against lands of other owners under these same contracts for illegal amounts; that he threatens to, and will, in the future issue certificates in illegal amounts against the lands of the plaintiffs if not restrained by the courts; that when such certificates are issued, they will be delivered to the defendants and placed of record in excessive amounts. Copies of the contracts in question are attached to the complaint and made a part of it.

The contentions of the plaintiffs as set forth in the complaint are that, under the statute and the contracts, the commissioner of public lands has no discretion, right, or authority to issue, and the other defendants have no right to receive, certificates which include certain items of cost alleged to be erroneous, substantially as follows: Certificates based upon the cost of sixteen cents per cubic yard for the fill, which amount is alleged to be above the actual cost and therefore excessive; certificates which include as cost of the fill sixteen cents per cubic yard for filling adjacent streets; and certificates for the extra cost of modified bulkheads without the previous approval of the governor. It is alleged that the commissioner of public lands has in the past misconstrued the law and the contracts in the particulars above stated, and threatens to, and will, issue certificates in excessive amounts against the lands of the plaintiffs, if not enjoined.

The statute authorizing the contracts in the case provides that the commissioner of public lands shall issue his certificate to the contracting parties, or their assigns, showing the actual cost of the fill in raising above high tide all the tide and shore lands to be filled in; and also that, upon the filing of the certificates in the office of the county auditor, the holders shall acquire a lien for the cost as specified in such certificate, with fifteen per cent additional thereon, with the proviso "that such lien shall not be operative for an amount exceeding the cost of the work as stated in the contract." Rem. & Bal. Code, § 8103. In § 8104 it is provided that:

"All persons or corporations purchasing said lands from the state in the meantime shall take the same subject to the ultimate lien upon the same, provided for herein."

Section 8106 of the act provides that the contracts shall specify the character of bulkheads and other restraining works, and that the commissioner shall be judge of the sufficiency thereof. Section 8107 provides that:

"In ascertaining the cost of filling in and raising above high tide of any tide or shore lands, the cost of all bulk-

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heads, and other restraining works, and the cost of filling in and raising above high tide of all streets, alleys, and public squares or places, shall be apportioned to the lands benefited thereby, in addition to the cost of filling in such lands."

In the contract it is stipulated between the state and the waterway company that, upon compliance by the latter with the contract, the state grants a lien upon the tide lands described therein as provided by the aforesaid act; that it will hold the land described in the contract subject to the operation thereof, and that it will do and perform by its authorized agents all and singular the acts and things mentioned and set out in such act of the legislature to be done and performed by the state of Washington, said act being made an integral part of the contract. The contract also provides that "the cost of the work shall in no case exceed, for excavation and embankment and for bulkheads and sea walls, the cost specified in the supplement hereto," which supplement provides that:

"The entire cost of said work, including the cost of bulkheads and sea walls, shall not exceed sixteen cents per cubic yard for each and every yard of earth put upon each tract or parcel of land to which any person or corporation has a pre-emption right of purchase, except as herein otherwise provided."

It is also provided that the commissioner shall have power to modify the plans and specifications for bulkheads and restraining walls, and that if such modification shall make the entire cost of the fill exceed sixteen cents per cubic yard, the commissioner shall cause such increased expense to be estimated and, with the approval of the governor, shall specify the sums in addition to said sixteen per cent per cubic yard to which the entire cost of such work shall be limited. The commissioner did require a modified and more expensive form of bulkhead, but this appears not to have been approved by the governor. These contracts were entered into in the year 1894. The plaintiffs' first applications to purchase

land were made in 1895. Contracts were issued in 1899, and deeds followed in 1905-6.

The appellants contend that the matter of determining the cost of bulkheads and street fills is vested in the state land commissioner, and that, under the law itself, he has been constituted the tribunal to determine when certificates have been earned under the contract, and when and to whom they shall issue, and what items shall be included therein, and to ascertain the total cost to be included in such certificates; that these matters have been by law committed to the commissioner, and he has complete jurisdiction over the subject-matter, and that his duties under the law and the contract require of him the exercise of judgment and discretion in both the ascertainment of facts and the interpretation of the law, and that the courts will not, in advance of any act being taken by a public officer, enjoin such acts, and undertake to guide and control his judgment or discretion in matters committed to his care in the ordinary discharge of his official duties.

It is true that, in the case of *Scholpp v. Forrest*, 11 Wash. 640, 40 Pac. 133, this court determined that the law vests in the commissioner of public lands the duty of determining when the certificates have been earned and when they shall be issued, and in *Mississippi Valley Trust Co. v. Hofus*, 20 Wash. 272, 55 Pac. 54, where certificates had been issued prior to the sale of the land by the state and had become a lien thereon, that the subsequent purchasers could not be heard to deny the validity of the lien; and to the same effect in *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845. But it was not decided in those cases that the commissioner of public lands could issue certificates which would become a valid lien against lands sold by the state in excess of the amount provided by law and by the contract.

It seems clear, from the provisions of the law and the contract above quoted, that the limit of the cost which may

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become a lien against the lands is sixteen cents for each cubic yard of earth put upon each parcel of land, because the contract in plain terms so recites. There could be no reasonable controversy over this question were it not for the provision of the act, Rem. & Bal. Code, § 8107, which recites that "in ascertaining the cost of filling in and raising above high tide of any tide or shore lands, the cost of all bulkheads, and other restraining works, and the cost of filling in and raising above high tide of all streets, alleys and public squares or places, shall be apportioned to the lands benefited thereby, in addition to the cost of filling in such lands." This section provides the method of determining the cost, and does not fix the limit of price. The contract fixed such limit when it said, "that the entire cost . . . shall not exceed sixteen cents per cubic yard for each and every yard of earth put upon each tract or parcel of land." The facts alleged and shown are that the commissioner of public lands had theretofore construed the contract and the law to mean that such lands were liable for the number of cubic yards of fill at sixteen cents per cubic yard, and in addition thereto the distributed street and alley fill and additional bulkheads, and also fifteen per cent additional upon the whole sum.

We are of the opinion that, under the contract, the lands were liable only for the maximum of sixteen cents per cubic yard fixed by the contract, and fifteen per cent additional when the certificates become a lien upon the lands filled, except where additional costs of bulkheads are approved by the governor, and that the commissioner of public lands acts outside of his authority when he allows and issues his certificates for more than that sum. It is no doubt true that, when the commissioner of public lands acts within his authority as defined by law and by the contract, and exercises his judgment and discretion in issuing certificates within the sixteen cent limitation, his acts cannot be inquired into except for fraud or abuse of the trust reposed in him. But

when he acts without the provisions of the law and the contract entered into, he transcends the bounds of his authority, and when he thereby creates a cloud upon the title of the lands in excessive amounts, such illegal act may be enjoined. High, Injunctions, §§ 1308-9; Pomeroy, Equity Jurisprudence, § 1345; *Noble v. Union River Logging R. Co.*, 147 U. S. 165; *Bond v. Mayor & Common Council of New-ark*, 19 N. J. Eq. 376.

It is argued by appellants that the state is a necessary party to this action, but the state has no interest, pecuniary or otherwise, in this litigation. It has sold the land, and is not liable for the price of the fills made upon the lands and has no interest therein. The fact that the waterway is for the benefit of the state is entirely unimportant, because no relief is sought on account of the waterway, which is a mere incident to the filling of the adjacent lands. The whole controversy here lies between the owner of the land and the contractors who are seeking to impress a lien upon the lands for an excessive amount. The commissioner of public lands is a proper party because he is the agent of both parties under the contract and the law authorizing it, and is charged with certain duties in regard thereto. He is not a party because he represents the state or the interests of the state in the litigation.

We are of the opinion, therefore, that the injunction was properly granted, and the order appealed from is therefore affirmed.

DUNBAR, CROW, PARKER, and MORRIS, JJ., concur.

CHADWICK, J. (dissenting).—I dissent. This action requires a construction of Rem. & Bal. Code, § 8103. That part of the law which controls the action of the commissioner of public lands in such cases is as follows:

“Upon the completion of the work, provided for by said contract, or any part thereof, capable of separate use for the purposes of navigation, according to the terms and conditions of said contract, and within the time provided therein,

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or such further extension of time as may have been granted by virtue of the preceding section, the commissioner of public lands shall issue his certificate to the contracting parties, or their assigns, showing the actual cost of the filling in and raising above high tide of all tide and shore lands so filled in and raised above high tide by such completion of said work, or such separate portion thereof, and specifying and describing, with reasonable certainty, the lands so filled in and raised above high tide. Upon the filing in the office of the county auditor of the county or counties in which such lands are situated, of such certificate of the commissioner of public lands, said contracting parties shall acquire a lien, and the same shall thereupon attach, for the amount specified in such certificate, with fifteen per cent additional thereon, and with interest on such amount and additional percentage from the date of such certificate at the rate of eight per cent per annum until payment: Provided, however, That such lien shall not be operative for an amount exceeding the cost of the work as stated in the contract, or, as the case may be, such portion of said stated cost as shall be proportionate to the part of the work with reference to which the certificate has issued, upon the bonds specified in such certificate."

In my judgment the duty of the commissioner of public lands is controlled entirely by this statute. He has no discretion; certainly none that the court should control. The duty of certifying the cost of the improvements, whatever it may be, is made mandatory; while the amount of the lien depends upon the contract. There can be no lien or cloud upon the title for an excessive amount, for the legislature was careful to provide against such contingencies. There was no authority, therefore, in law for the issuance of the injunction *pendente lite*. The effect of the decision of the majority is to decide the case upon its merits when it is not properly before us.

RUDKIN, C. J., GOSE, and FULLERTON, JJ., concur with CHADWICK, J.

[No. 8765. Department Two. October 15, 1910.]

ANNA E. ABRAMS *et al.*, Respondents, v. THE CITY OF
SEATTLE, Appellant.¹

ELECTRICITY—DEGREE OF CARE—PRESUMPTIONS—RES IPSA LOQUITUR—MUNICIPAL CORPORATIONS. A city furnishing electric light for residential uses owes the highest degree of skill, care, and diligence, and a presumption of negligence arises, on the principle of *res ipsa loquitur*, where a private consumer, turning on an electric light in the ordinary manner, is electrocuted by reason of a defective ground for the secondary wire, which had come in contact with a primary wire in a high wind.

NEGLIGENCE—PRESUMPTIONS—RES IPSA LOQUITUR—INSTRUCTIONS—BURDEN OF PROOF. Where the doctrine of *res ipsa loquitur* casts the burden of proof upon a city to overcome the presumption of negligence from the electrocution of a consumer while turning on an electric light in his residence, it is not prejudicial error to instruct the jury that the fact of the accident casts the burden upon the city to show by a fair preponderance of the testimony that it was not guilty of negligence (RUDKIN, C. J., dissenting).

ELECTRICITY—DEGREE OF CARE—INSTRUCTIONS—MUNICIPAL CORPORATIONS. In an action for wrongful death from electric shock caused by a defective ground in a secondary wire of a city lighting system, it is not prejudicial error to instruct the jury that every reasonable effort must be made to adopt and use all proper means readily obtainable and known to science, taken in connection with other proper instructions on the subject.

ELECTRICITY—NEGLIGENCE—EVIDENCE—SUFFICIENCY—MUNICIPAL CORPORATIONS. The negligence of the city is for the jury, where a *prima facie* case was made by the fact that its electric lighting system electrocuted a private consumer while turning on a light in his residence, and there was evidence of a defective ground of the secondary wire, which became crossed with a primary wire, that such condition had existed several hours without giving notice of its condition, and that the system was not in proper order or not supplied with modern appliances.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 24, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Affirmed.

¹Reported in 111 Pac. 168.

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Citations of Counsel.

Scott Calhoun and *H. D. Hughes*, for appellant, contended, among other things, that the instruction requiring the defendant to establish want of negligence by a preponderance of the evidence was prejudicial error. *Labatt, Master and Servant*, § 884; 1 *Jones, Evidence*, §§ 174, 182; 1 *Wharton, Evidence*, § 357; 4 *Wigmore, Evidence*, §§ 2487-93; 29 *Cyc.* 599; *Lyles v. Brannon Carbonating Co.*, 140 N. C. 25, 52 S. E. 233; *St. Louis Southwestern R. Co. v. Parks*, 97 Tex. 131, 76 S. W. 740; *San Antonio & A. P. R. Co. v. Robinson*, 73 Tex. 277, 11 S. W. 327; *Field v. French*, 80 Ill. App. 78; *Weigley v. Kneeland*, 18 App. Div. 47, 45 N. Y. Supp. 388; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871; *Lamb v. Camden etc. R. Co.*, 46 N. Y. 271, 7 Am. Rep. 327; *Whitlatch v. Fidelity & Casualty Co.*, 149 N. Y. 45, 43 N. E. 405; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339, 345; *Heinemann v. Heard*, 62 N. Y. 448; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Stewart v. Van Deventer Carpet Co.*, 138 N. C. 60, 50 S. E. 562; *Graves v. Colwell*, 90 Ill. 612. The court erred in instructing the jury that "every reasonable effort must be made to adopt and use all proper means readily obtainable and known to science for the prevention of accidents." 3 *Elliott, Railways*, § 1224; *Herzog v. Municipal Electric Light Co.*, 89 App. Div. 569, 85 N. Y. Supp. 712; *Block v. Milwaukee St. R. Co.*, 88 Wis. 371, 61 N. W. 1101; *Steinweg v. Erie Railway*, 43 N. Y. 123; *Mason v. Richmond & D. Co.*, 111 N. C. 482, 16 S. E. 698, 32 Am. St. 814, 18 L. R. A. 845; *Witsell v. West Asheville & S. S. R. Co.*, 120 N. C. 557, 27 S. E. 125. The proximate cause of the accident was the wrongful intervention of a responsible human being, for whose act no liability attaches. The blast was the proximate cause of the accident. 1 *Shearman & Redfield, Negligence*, § 38; *Wharton, Negligence*, § 134; *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400. The inquiry is not whether the injury might have been avoided had the city known in advance that a blast was

to be fired which would produce certain conditions, but whether, taking conditions as they then existed, it was negligent in failing to anticipate the intervention of such extrinsic force and prevent the injurious result. For an accident such as this no liability can attach. Ray, *Negligence of Imposed Duties*, pages 133, 134; *American Brewing Ass'n v. Talbot*, 141 Mo. 674, 42 S. W. 682, 64 Am. St. 538; *Sofield v. Sommers*, Fed. Case No. 13,157; *Stone v. Boston & A. R. Co.*, *supra*; *Sullivan v. Jefferson Avenue R. Co.*, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167; *Fuchs v. St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; *Chandler v. Kansas City, Missouri Gas Co.*, 174 Mo. 321, 73 S. W. 502, 97 Am. St. 570, 62 L. R. A. 474.

McClure & McClure, H. W. Hogue, and Howard Waterman, for respondents, contended, *inter alia*, that the instruction casting the burden of proof upon the defendant to overcome the presumption was correct. *LaBee v. Sultan Logging Co.*, 51 Wash. 81, 97 Pac. 1104; *Pate v. Columbia & Puget Sound R. Co.*, 52 Wash. 166, 100 Pac. 324; *Jolliffe v. Northern Pac. R. Co.*, 52 Wash. 433, 100 Pac. 977; *Whitlach v. Fidelity & Casualty Co.*, 149 N. Y. 45, 43 N. E. 405; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380; *Heinemann v. Heard*, 62 N. Y. 448, 456; 2 Labatt, Master and Servant, § 834; 4 Wigmore, Evidence, § 2509; *Anderson v. McCarthy Dry Goods Co.*, 49 Wash. 398, 95 Pac. 325, 126 Am. St. 870, 16 L. R. A. (N. S.) 931; *Delahunt v. United Telephone & Telegraph Co.*, 215 Pa. 241, 64 Atl. 515, 114 Am. St. 958, 20 Am. Neg. Rep. 727; *Alexander v. Nanticoke Light Co.*, 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475, 17 Am. Neg. Rep. 354; *Newark Elec. Light & Power Co. v. Ruddy*, 62 N. J. L. 505, 41 Atl. 712, 5 Am. Neg. Rep. 402. The instruction as to the city's duty in the use of electricity was proper. *Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 61 N. W. 1101, 46 Am. St. 849, 27 L. R. A. 365; *Mason v. Richmond & D. R. Co.*, 111 N. C. 482, 16 S. E. 698, 32 Am. St.

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814, 18 L. R. A. 845; *Deans v. Wilmington & W. R. Co.*, 107 N. C. 686, 12 S. E. 77, 22 Am. St. 902; *Clark v. Wilmington & W. R. Co.*, 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749; *Witsell v. West Asheville & S. S. R. Co.*, 120 N. C. 557, 27 S. E. 125. The city was not exercising governmental functions, and is charged with the liability attaching to private persons. *Eaton v. City of Weiser*, 12 Idaho 544, 86 Pac. 541, 118 Am. St. 225, 20 Am. Neg. Rep. 504; *Davoust v. Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 20 Am. Neg. Rep. 7; *Ohrstrom v. Tacoma*, 57 Wash. 121, 106 Pac. 629. That the negligence of the city was not the sole cause of the accident is no defense. 1 Thompson, Negligence, § 75; Bishop, Non-Contract Law, §§ 39, 451; *Harrison v. Kansas City Elec. Light Co.*, 195 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293; *Newcomb v. New York Cent. & H. R. Co.*, 169 Mo. 409, 69 S. W. 348; *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Brennan v. St. Louis*, 92 Mo. 482, 2 S. W. 481; *Vogelgesang v. St. Louis*, 139 Mo. 127, 40 S. W. 653; *Brash v. St. Louis*, 161 Mo. 433, 61 S. W. 808; *Smith v. Union Trunk Line*, 18 Wash. 351, 51 Pac. 400, 45 L. R. A. 169; *Franklin v. Engel*, 34 Wash. 480, 76 Pac. 84; *Woolf v. Washington R. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997; *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360.

Crow, J.—About ten o'clock p. m. on March 12, 1908, W. L. Abrams, living in the city of Seattle, went into the kitchen of his residence, attempted to turn on an electric light, and received a shock which instantly killed him. The city of Seattle then owned and operated an electric power plant, from which, under contract, it was furnishing current to Abrams' house for illuminating purposes. This action was commenced against the city by Anna E. Abrams, and Eletha L. Abrams by Anna E. Abrams, her guardian *ad litem*, widow and daughter of W. L. Abrams, to recover damages resulting from his death. From a judgment in their favor, the defendant has appealed.

The electric current was transmitted from the original source of energy to a substation, from which it was further transmitted to various localities throughout the city over what were called primary wires, each carrying about 2,200 volts. By means of an instrument known as a transformer, the current from a primary wire was reduced to about 220 volts, and then transmitted over a secondary wire into residences for lighting purposes. The wire carrying 2,200 volts is called the "primary," and the wire which leaves the transformer and carries only 220 volts is called the "secondary." The former carried a current dangerous to human life, and the latter one that a man may receive into his body without injury. To prevent too heavy a current being carried into a residence, a properly constructed lighting system is provided with a ground, which is a device to divert any excessive current with which the secondary may become charged, and conduct it to the earth, whence it returns to the source of supply at the central station and registers upon a switch board panel. When a large amount of excess current is so conducted to the earth, the ground is a heavy one. When the amount is small, a light ground results. The ground device used by the city consisted of an iron rod about five feet and a half in length, driven full length into the earth. To this rod was securely riveted and soldered a number six copper wire which, running up one of the light poles, connected with the secondary wire. The various circuits extending from and returning to the station were numbered. The Abrams residence was on number two. When a ground occurred, it registered on the switch board panel at the station, by means of two lamps known as ground lamps, which ordinarily burn but dimly. When the ground registered, one of these lamps would go out, while the other would burn with great brilliancy. The city had a "two-phase" system, by which one set of ground lamps was used for two circuits. Circuit number two, conducting the current resulting in Mr. Abrams' death, was on the same phase with circuit number eight. If

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one of these circuits registered a ground, the operator at the station would be unable to observe a subsequent ground coming over the other circuit on the same phase, until the first ground had been corrected. About ten o'clock on the evening of the accident, a ground was registered from circuit number eight and continued for several hours. The effect of this condition was that a subsequent ground on circuit number two would not register at the central station.

A short time before his death, Mr. Abrams, from his window, had noticed some electrical phenomena on the wires near his home, afterwards shown to have been caused by the "primary" crossing and coming in contact with the "secondary." This contact was not continuous but intermittent, a variable but heavy wind occasionally throwing the wires together. Evidence was introduced to show that the "secondary" wire and the insulator to which it was attached had become separated from the cross-arm of the light pole; that the secondary had fallen across the primary where insulation had become defective from rain and other causes; that the 2,200 voltage from the primary was thus transmitted to the secondary; that this excess voltage did not reach the earth because the ground device was out of repair; that this condition of the wires and ground might have been caused by the blasting of a large stump near by; that the ground did not carry the excess current from the secondary, and that it was therefore carried into the dwelling house where it electrocuted Mr. Abrams. The appellant contended that it had exercised due diligence in the inspection of its wires and other appliances; that it had used such modern and proper devices as were ordinarily used and required; that the defective condition of the wires and ground was caused without its participation, knowledge, or consent, by third parties, and that the death of Mr. Abrams resulted from an unavoidable accident, and not from its negligence.

Appellant first contends that the trial judge erred in giving the following instruction:

"I instruct you that if you find that the accident complained of was one which, in the ordinary course of business, would not have occurred except for failure or neglect on the part of the defendant, its agents or employes, to use that degree of care which the law requires and which I will hereafter explain to you, and you further find that the negligent operation of the defendant's electrical apparatus is naturally accompanied with danger, and that knowledge of its condition is practically limited to the defendant or its servants, and evidence as to the same is unavailable except through it or them, and that the deceased was under no obligation to know, and did not know, or have reason or opportunity to know of the danger that threatened him, then the mere happening of the accident under such circumstances creates the presumption that the defendant was negligent, and in that case the burden would be shifted to the defendant to show by a fair preponderance of the testimony that it was not guilty of such negligence."

In substance, appellant's contention is that the trial judge erred in holding the burden of proof, which was shifted to it to show that it was not negligent, should be sustained by it by "a fair preponderance of the testimony." We think no prejudicial error was committed in this regard. The doctrine of *res ipsa loquitur* should be applied to its fullest extent in this case. The appellant, for its own profit, was dealing in one of the most dangerous agencies known to modern science. Electricity is a silent power which ordinarily can be neither seen nor heard. Yet it can be so controlled, by those upon whom the duty of its control is imposed, that it may safely be conducted into a private residence, where it becomes harmless and useful. The city had contracted to furnish the Abrams house with light. It was under an implied contract to do this in the safest manner possible. Its duty was to protect Abrams and his family, by exercising the highest degree of care, skill, and diligence in its selection, construction, and maintenance of devices and appliances. Mr. Abrams was entitled to assume, when attempting to utilize the electric current in the customary manner, that he would not be subjected to personal injury or sudden death. When

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he did so attempt to use it and was electrocuted, a presumption of negligence on appellant's part immediately arose. The fact of his injury was itself sufficient to constitute a *prima facie* case of appellant's negligence. To say that his heirs or representatives cannot recover damages until they affirmatively prove some specific act of negligence by a fair preponderance of the evidence, might result in a denial of their right of recovery, no difference how negligent the appellant may have been. Twenty-two hundred volts of electric current could not have passed through the body of Abrams without some negligence, mismanagement, or mishap which, under ordinary circumstances, could only have been known to, or be explained by, the party in charge of the system. The accident being shown, the burden devolved upon the appellant either to disclose a cause for which it was not responsible, or otherwise show that it (the appellant) was guilty of no negligence. How could appellant do this? Manifestly by affirmatively showing the true cause of the accident, or that its system was in as perfect condition and repair as it could be kept by exercising the highest degree of diligence, and that Abrams' death was the result of some accident beyond appellant's control. This burden devolved upon appellant, and while it might perhaps have been better for the trial judge to have omitted from the instruction the words "by a fair preponderance of the testimony," we cannot say that their use, in the light of admitted conditions and of other instructions given, was prejudicial, or deprived appellant of any substantial right.

"While it is true, as a general proposition, that the burden of showing negligence on the part of the one occasioning an injury rests in the first instance upon the plaintiff, yet, . . . when he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus rests upon the defendant to prove that the injury was caused without his fault.' When the physical facts surrounding an accident in themselves create a reasonable probability that the accident resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms evidence

of negligence, in conformity with the maxim '*Res ipsa loquitur*.' It would seem more accurate to say, not that negligence is presumed from the mere fact of the injury or accident, but, rather, that it may be inferred from the facts and circumstances disclosed, in the absence of evidence showing that it occurred without negligence." Jaggard, *Torts*, p. 988.

Practically speaking, it is immaterial whether to the duty of explaining the cause of the accident which the law imposes upon appellant, we apply the term "burden of proof" or the term "preponderance of the evidence." As suggested by counsel for respondents, there can be no magic in any particular form of words. To grant a new trial on the theory that the instruction given was so erroneous as to be prejudicial, would, we think, be a miscarriage of justice.

Appellant further contends that the trial court erred in instructing the jury as follows:

"Every reasonable effort must be made to adopt and use all proper means readily obtainable and known to science for the prevention of accidents;"

and in refusing the following requested instruction:

"I charge you that the law does not require that the city should install and adopt every new device and electrical appliance and safeguard that may be put upon the market for sale; the city has done its whole duty in regard thereto when it installs and uses all those appliances and devices and safeguards which are in common and general use and generally approved by electrical experts and men who know about such matters and when it has exercised that degree of care and caution heretofore defined to you in these instructions in the adoption and use of such appliances and devices."

The instruction to which the appellant excepts is an excerpt from the following instruction given by the court, in which we italicize the words to which appellant objects:

"The general charge of negligence or carelessness made by the plaintiffs against the defendant includes negligence in the appliances and devices adopted and installed as a part of its system, and negligence in the maintenance and operation

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of its system as installed. With reference to the city's duty in the matter of its appliances, devices, etc., the law requires that the city shall, in selecting and installing its appliances and devices, use that degree of care which reasonably prudent men engaged in the same line of business would use under similar circumstances, to have and to procure and install such as the experience of men so engaged has shown to be reasonably safe for the purposes for which they are used, in view of all the conditions and circumstances connected with the business and of the dangers to be reasonably apprehended. *Every reasonable effort must be made to adopt and use all proper means readily obtainable and known to science for the prevention of accidents.* In determining the question of the city's negligence in this respect it is proper for you to consider whether as to any particular appliance, device or manner of installment or arrangement, complained of in the evidence in this case, there exists a reasonable difference of opinion among electrical experts and men possessing knowledge, and qualified to speak thereon, concerning the efficiency of such appliances or system, and in the light of all these facts to determine whether the city is or is not properly chargeable with negligence in the adoption or arrangement of its devices or appliances."

It seems to us that this instruction is such a fair statement of the law as not to mislead the jury to appellant's disadvantage. It would be difficult to frame a more satisfactory or complete statement of appellant's duty in the matter of adopting modern and safe appliances. The rights of both parties were well guarded, and the question of fact whether appellant did discharge its duty was thereby properly submitted to the jury for determination.

Appellant vigorously insists that the trial court erred in denying its challenge to the sufficiency of the evidence, and its later motion for judgment notwithstanding the verdict. Its position seems to be that the sole and direct cause of the accident was the wrongful and illegal act of a third party in firing a blast, which caused the crossing of the wires and so disturbed the ground device as to impair its usefulness; that the blasting occurred in the morning about seven o'clock, on

the day of the accident; that the city had but recently inspected its wires, ground device, and other appliances; that it had no knowledge, until after the accident, of the disarrangement of its wires, caused by the blast; that it exercised the utmost diligence, and that the accident resulted from the wrongful and illegal act of a third party, for whom it is not responsible. This contention necessarily assumes that other acts of negligence, alleged by respondents, must be eliminated from the consideration of the jury.

The respondents contended, and offered evidence to show, that certain appliances used by appellant were not suitable or appropriate for the purposes they were intended to serve. But without regard to such contentions, we have concluded, from an examination of all the evidence, too voluminous to be here stated, that the questions whether the blast mentioned caused the accident, whether the city had timely notice of such blasting, whether it was diligent in inspecting and protecting its wires and equipment, and whether it used such modern appliances as were required by that high degree of care imposed upon it, were all for the jury, and the evidence on these issues was clearly sufficient to support the verdict. Mr. Abrams was killed in his own residence, without warning, without his fault, by an excessive current of electricity, transmitted over appellant's wires. Appellant's wires were crossed. There was evidence that its ground device did not properly perform its functions, and that its servants in charge of the central station were not informed of the condition of its wires for several hours after Mr. Abram's death. It was its duty to have and keep all of its appliances in safe condition and proper repair. It did not do so, and it was certainly a question for the jury to determine whether it was negligent or whether it had exercised that high degree of care and diligence which the law requires from a person dealing with such a deadly agency.

In *Royal Elec. Co. v. Heve*, 11 Quebec L. R. (K. B. 1902) page 436, plaintiffs recovered damages for the death of a

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husband and father who had been electrocuted by coming in contact with an electric light bulb, and the defendant appealed. It contended, and had introduced evidence to show, that the current came through the guy wire of another electric company which had crossed its secondary. Hall, J., speaking for the court, at page 452, said:

"But in my opinion, it is a matter of indifference, legally speaking, where this current originated. The appellants should be held responsible for it under any circumstances. They deal in a commodity of a recognized dangerous character, the control of which is a matter of technical knowledge and experience, and entirely uncomprehended by the general public. When a company like the appellants, organized under the name of an electric company, hold themselves out to the public as dealers in and suppliers of that commodity for gain, and make contracts with private individuals for furnishing light or power over a system constructed and controlled by themselves, they are bound to deliver it in a form and under conditions of safety for the person and property for whose use the company charge and receive compensation, and they are also bound, in the discharge of their part of the contract, to a supervision and diligence proportionate to the peculiar character and danger of the commodity in which they deal. . . The implied contract between the appellants and deceased was that they should supply his premises with a safe electrical current for lighting purposes by the lamps which they furnished. They failed in this respect, and in the use of their lamps he received a current of electricity by which he was instantaneously killed. The presumption is that it came over the same system and from the same source as that by which his ordinary supply was delivered to him by appellants. The burden of proof is upon them to show the contrary. This they have failed to do, and the judgment holding them responsible for the accident should be confirmed."

It is evident from the verdict in this case that the jury concluded the appellant had not sustained the burden of proof resting upon it to show that the accident was not caused by its negligence. In *Chaperon v. Portland Elec. Co.*, 41 Ore. 39, 67 Pac. 928, plaintiff's horse was killed during the night season at about three o'clock a. m., by coming in contact with

a broken wire heavily charged with electricity. The defendant introduced evidence tending to show careful and frequent inspection on its part, and that the break was caused without its knowledge by a violent storm which occurred at an earlier hour of the same night. Relying on this evidence, it moved for a directed verdict. Its motion was denied. The appellate court, at page 47, said:

"When plaintiff made a *prima facie* case, this imposed upon the defendant the burden of showing, as we have seen, that the fracture of the wire was a condition not due to its fault, or that it used due care in the construction and maintenance of its system, and that the accident was one that could not have been provided against by reasonable foresight and precaution. This burden should not be confused with the burden of making the better case as between the plaintiff and defendant. The plaintiff must have made the better case in the end by the preponderance of evidence. When the defendant produced its evidence, the case rested; and it became a matter for the jury to determine whether it had succeeded, or whether, notwithstanding its attempt at exoneration, plaintiff's *prima facie* case was even yet the stronger and more satisfactory. The questions to be passed upon were of fact, and it was not within the province of the court, under the evidence adduced, to say to the jury, by directing a verdict, that its exoneration has been substantiated, and therefore that plaintiff's *prima facie* case had been overcome. So there was no error in finally submitting the case to the jury."

Other assignments of error, based upon instructions given and refused, and upon the admission of evidence relative to previous blasting near the wires, we find to be without merit.

The appellant has been awarded a fair trial. The jury found against it, and their verdict must stand. The judgment is affirmed.

DUNBAR, MOUNT, and PARKER, JJ., concur.

RUDKIN, C. J. (dissenting).—I concur in the foregoing opinion, in the main, but cannot approve of an instruction that the burden of proof is on the defendant to show a want of negligence, by a fair preponderance of the testimony, in cases

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where the doctrine of *res ipsa loquitur* applies. Such an instruction is inherently and fundamentally wrong. The presumption of negligence which arises from the mere happening of an accident in this class of cases is a mere presumption of fact. Its weight will vary according to the circumstances of each individual case and is wholly for the jury. The distinction between the burden cast upon the defendant to explain the cause of an accident, or exculpate himself from the charge of negligence, and the burden of proof on the main issue in the case, is clearly pointed out in *Chaperon v. Portland Elec. Co.*, 41 Ore. 39, 67 Pac. 928, cited in the majority opinion, where the court said: "This burden should not be confused with the burden of making the better case as between the plaintiff and defendant. The plaintiff must have made the better case in the end by the preponderance of evidence. When the defendant produced its evidence, the case rested; and it became a matter for the jury to determine whether it had succeeded, or whether, notwithstanding its attempt at exoneration, plaintiff's *prima facie* case was even yet stronger and more satisfactory." In other words, when the proof is all in, the jury must be satisfied from the entire testimony that the charge of negligence is established by a preponderance of the evidence, for, if not, the plaintiff fails in his action. This rule is so elementary that I deem further discussion unnecessary. Nor can it be said, as a matter of law, that an instruction which imposes the burden of establishing a cause of action or defense, by a preponderance of the testimony, on the wrong party, is not prejudicial.

[No. 9182. Department Two. October 17, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Charles E. Shepard et al., Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.¹

MANDAMUS—WHEN LIES—ELECTIONS—CERTIFICATION OF CANDIDATES. Mandamus does not lie, as a matter of right, to compel the county auditor to place the names of candidates upon a ballot until they have been, or it is certain that they will be, certified to the auditor.

ELECTIONS—RIGHT TO VOTE—NATURE. While the right to vote is a constitutional right, under Const., art. 6, § 6, providing that all elections shall be by ballot, and that the legislature shall provide a method of voting by secret ballot, it is subject to regulation by the legislature in any reasonable way not prohibited.

ELECTIONS—RIGHT TO VOTE—REGULATIONS—BALLOTS—REASONABLENESS. Rem. & Bal. Code, § 4893, subd. 6, providing that no candidate's name shall appear on the ballot more than once, and that the candidate, if nominated by two or more parties, may designate the party under whose title he desires to appear, is a reasonable regulation of the elective franchise, and violates no constitutional right of the voter to vote for a candidate of his choice.

ELECTIONS—BALLOTS—STATUTES—IMPLIED REPEAL. Rem. & Bal. Code, § 4893, subd. 6, providing that the names of candidates shall not appear on the ballot more than once, was not impliedly repealed by the amendment of 1909 (Id., § 4842), providing that the names of judges nominated at a joint convention of several parties shall appear on the tickets of all the parties holding the joint convention; since there is no such conflict between the two acts as to indicate any such legislative intent.

ELECTIONS—POLITICAL PARTIES—RIGHTS. Political parties not being protected by the constitution, they have no constitutional right to have their full tickets printed upon a ballot, and a law is not unconstitutional because it tends to destroy political parties.

Certiorari to review an order of the superior court for King county, Carey, J., entered October 11, 1910, upon sustaining a demurrer to the petition, dismissing an application for a writ of mandamus to the county auditor to compel the placing of relators' names upon an election ballot. Affirmed.

¹Reported in 111 Pac. 233.

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Thomas M. Vance, J. W. Robinson, W. H. B. Thomas, and C. G. Heifner, for relators.

George F. Vanderveer and W. V. Tanner, for respondent.

CHADWICK, J.—This proceeding is directed against Otto Case, the county auditor of King county. The question put to this court by the relators is whether that provision of the general election law, which reads as follows,

“No candidate’s name shall appear more than once upon the ballot: Provided, that any candidate who has been nominated by two or more political parties may, upon a written notice filed with the clerk of the board of county commissioners at least twenty days before the election is to be held, designate the political party under whose title he desires to have his name placed;” (Rem. & Bal. Code, § 4893, subd. 6)

violates the constitutional rights of a candidate who has been nominated by two political parties, and is an unwarranted interference with the rights of political parties. Relators insist that the names of the candidates filed with the secretary of state as the nominees of the Democratic party shall appear under that title or designation upon the official ballot, and the same persons being nominated by a voluntary convention styling itself “Independent Non-Partisan Judiciary Party,” that the same names shall likewise appear under that designation. Before proceeding to the discussion of these propositions, it may be known that technically the question is not properly before the court, and ordinarily we would decline to hear a petition filed under such circumstances. It is not shown, and in fact is not asserted, that at the time the proceeding was instituted in King county, the names of the candidates had been certified to the county auditor; nor is it certain that they have even now been so certified. But because of the supposed political advantage which the relators assume will result to them from a decision by this court, and the public importance of the question, we shall unhesitatingly meet the issue.

Before proceeding to the main discussion, there is another

question which may be disposed of. The point was made in argument that the Independent Non-Partisan Judiciary Party is not in fact a political party. It may, indeed, be questioned whether a limited number of electors may gather together, and although still claiming allegiance to existing political parties, nominate candidates in opposition to them, and be a political party within any accepted definition of that term. However, having no desire to deprive relators of any right, or to enter into the discussion of even doubtful rights, we shall accept the situation as we find it. The filing having been made under the advice of the attorney general, we shall assume that the relators are the nominees of regular political parties, and will not pursue the subject further.

In determining the constitutionality of the law, there are certain fundamental principles to which we may safely recur. All laws passed by the coordinate branch of the government and approved by the executive are presumed to be constitutional, and courts will not conjure theories to overturn and overthrow the solemn declarations of the legislative body. There must be a plain violation of some provision of the fundamental law. The right to vote is a constitutional right, given by the people to certain citizens and withheld from others. But the manner in which the franchise shall be exercised is purely statutory. It is not within the power of the legislature to destroy the franchise, but it may control and regulate the ballot, so long as the right is not destroyed or made so inconvenient that it is impossible to exercise it. It follows, then, that that which does not destroy or unnecessarily impair the right must be held to be within the constitutional power of the legislature.

Bearing in mind these general principles—and they will not be challenged, it may be said also that, in almost every state which has adopted the Australian ballot system, or a modification of it, a provision similar to the one before us for construction has been adopted, and where questioned, has been sanctioned by the courts, with one exception, as a lawful and constitutional exercise of the legislative power. A law which

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has been generally adopted by the legislative bodies of the country and approved by the executive, when challenged as unconstitutional, demands more than passing consideration; for it cannot be presumed that the judicial department is the only one endowed with sufficient wisdom and integrity to insure the preservation of the constitutional right of the citizen. Constitutional government by the people represents the greatest and grandest struggle of humanity for its betterment, and in its accomplishment marks the uttermost political accomplishment of the human race. The people have reserved to themselves the general right to legislate, fixing certain boundaries, and the province of the court is to see that the pendulum of popular emotion does not swing beyond the limit fixed by the people themselves in the fundamental law. Therefore, a law comes to the courts clothed with every presumption of regularity, and unless it be clear that it violates some express provision or inherent principle of the bill of rights, the court must give sanction to the will of the people as presently declared, and uphold the law. In this case it is not contended that any constitutional right of the voter is violated; but it is insisted that the candidate, and the political party which is his sponsor, are denied a constitutional right; that the voter is denied the privilege of voting for a nominee under the party designation which represents his party principles, while others are not so denied.

The people have purposely, and we must presume for some reason, left details to the legislature, for the only provision of the constitution which refers to the manner of conducting elections is art. 6, § 6, which reads as follows:

"All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot."

So long, then, as the elector has a right to vote by ballot, and the secrecy of that ballot is preserved, he cannot, nor can the candidate, complain. A law may, in some instances, work a hardship to the individual. In fact, all law works

hardship and inconvenience to the individual. But organized society is founded upon the principle that the convenience of the individual must give way to the common good. So long, then, as the elector has the privilege of voting for the candidate of his choice, and a way is provided, there can be no challenge of the law on constitutional grounds. Only such provisions as may in their operation shut off the voter from the ballot box will be held obnoxious to the constitutional guaranty of the right to vote. *State of New Jersey v. Black*, 54 N. J. L. 446, 24 Atl. 489, 1021, 16 L. R. A. 769.

The error of the relators' reasoning lies in assuming that an elector has an inherent right to vote in his own way, or in the manner of his choice. On the contrary, the law is,—and it is declared without division of the courts,—that the right to vote is neither a property right nor a right of person, but a mere political privilege which the legislature may regulate to any extent not prohibited by the state or Federal constitutions. 15 Cyc. 281; 10 Am. & Eng. Ency. Law (2d ed.), 568; Cooley, Const. Lim. (6th ed.), 752. See, also, the following late cases: *Riter v. Douglass* (Nev.), 109 Pac. 444; *Russell v. State ex rel. Crowder*, 171 Ind. 623, 87 N. E. 13; *Savage v. Umphries* (Tex. Civ. App.), 118 S. W. 893; *Morris v. Colorado Midland R. Co.* (Colo.), 109 Pac. 430; *Healey v. Wipf*, 22 S. D. 343, 117 N. W. 521; *Coggeshall v. City of Des Moines*, 138 Iowa 730, 117 N. W. 309, 128 Am. St. 221; *State ex rel. Workman v. Goldthait* (Ind.), 87 N. E. 133; *DeWalt v. Bartley*, 146 Pa. St. 529, 24 Atl. 185, 28 Am. St. 814, 15 L. R. A. 771.

It is upon this principle that registration, laws requiring a voter to vote in the precinct of his residence, laws requiring educational or property tests, the arbitrary fixing of the times for opening and closing the polls, the difference in time during which the polls shall be kept open, and similar laws, are sustained, and upon which the right to regulate the form of the ballot must be made to rest. In *DeWalt v. Bartley*, the court, in construing a similar regulation, said:

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"It was contended that the provision or discrimination against the Prohibition party is in violation of that clause of the constitution which declares that elections shall be free and equal; and also § 7, article 8, which declares that all laws regulating the holding of elections by the citizens shall be uniform throughout the state; that these constitutional provisions were intended to secure to every citizen equality in the manner of voting, and to prohibit the legislature from passing any law which shall give, directly or indirectly, an advantage to some voters, which will not equally apply to all voters. This contention is plausible, but unsound. The act does not deny to any voter the exercise of the elective franchise because he happens to be a member of a party which at the last general election polled less than 3 per cent of the entire vote cast. The provision referred to is but a regulation, and we think a reasonable one, in regard to the printing of tickets. The use of official ballots renders it absolutely necessary to make some regulations in regard to nominations, in order to ascertain what names shall be printed on the ballot. The right to vote can only be exercised by the individual voter. The right to nominate, flowing necessarily from the right to vote, can only be exercised by a number of voters acting together. Three persons may claim to be a political party, just as the three tailors of Tooley street assumed to be 'the people of England.' It follows, if an official ballot is to be used, nominations must be regulated in some way; otherwise the scheme would be impracticable, and the official ballot become the size of a blanket."

The same reasoning was pursued by this court when it sustained the direct primary law:

"From the fact that the state has assumed to provide an official ballot for the general election, it must resort to some process of selection to determine the candidates whose names shall appear upon the ballot. It cannot print the names of the entire list of electors on the ballot, nor can it print thereon the name of every elector who may choose to become a candidate. Such a proceeding would make the ballot too cumbersome for any practical purpose, and in consequence the election a farce. Since, then, the state by its legislature must resort to some process of selection, the only limitation that can be put thereon is that the process adopted be reasonable.

The legislature should not go to extremes in either direction. To print the names of every person who desires to become a candidate would be an extreme in the one direction, while to print only the names of the candidates of the party dominant at the last preceding election would be an extreme in the other. But between the extremes it is at once apparent that there is a wide field for choice, within which it cannot safely be said that the legislature has violated its just discretion. The method here adopted the court cannot say is unreasonable." *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728.

The voter having, then, only such inherent right as the constitution gives, and not, as contended, such unrestrained privileges as it does not expressly deny, the main question has been met without difficulty, by reference to these general principles, by the courts of Wisconsin, Michigan, and Ohio. In *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239, it was contended that a similar statute violated that section of the constitution which provides that all votes shall be by ballot, in that it deprived the voter of a political party of his right to vote the ticket of the party to which he belonged. The court met the issue, saying:

"No reason for this contention is perceived. The word 'ballot' and the expression 'vote by ballot' had a well-understood and universal meaning at the time of the adoption of the constitution, and it must be taken as the law that the thought which was in the minds of the framers of the constitution was in harmony with such meaning. Any attempt to go outside of that would be usurpation, not interpretation or construction. It would be a method of judicial procedure that would render any legislation, however plainly worded, subject to change by judicial construction to suit the judgment of courts as to the best legislative policy. The word 'ballot' means, in the election of public officers, and always meant, a paper so prepared by printing or writing thereon as to show the voter's choice, and 'vote by ballot' the deposit of such paper in a box in such a way as to conceal the voter's choice if he so desires. In that sense and in no other the words were used in the constitution, and they secure to each person entitled to vote the rights which their meaning clearly conveys, and they are in no way

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interfered with by the act under consideration. The official ballot, so called, is not complete when furnished to the elector as he enters the booth to prepare his ballot. It is a mere form for ballot. When marked and prepared by the voter so as to show his choice at the election, then, and not till then, does it become his constitutional ballot; and it is not, and cannot be, contended but that the freest opportunity practicable is given under the law for the voter to deposit such ballot so as to conceal his choice of candidates, indicated therein, if he so desires. It follows that no constitutional guaranty in regard to voting by ballot is in any way contravened."

In *Todd v. Election Commissioners*, 104 Mich. 474, 62 N. W. 564, 64 N. W. 496, 29 L. R. A. 330, the same question was resolved in the same way. Grant, Justice, who pronounced the judgment of the court, said:

"It is also insisted that the candidate has the constitutional right to have his name appear upon the ticket of every party which indorses him. It gives every candidate the right to have his name appear upon the ticket once. Naturally, it belongs in the column of that party with which he is openly affiliated; but if he chooses to have his name attached to the ticket of some other party, and that party does not object, he possesses that right. But I know of no reason or authority for saying that any candidate possesses the constitutional and inalienable right to have his name appear more than once upon the official ballot containing the tickets of two or more political parties. The Australian ballot contemplates that his name shall be there but once. It follows then that every voter has a reasonable opportunity to vote for him. This is the sole constitutional right guaranteed him. He has no occasion to find fault so long as he is permitted to have his name upon the ballot upon such ticket as he chooses, with the constitutional right following of an opportunity given to every voter to vote for him, which he can do by simply making two crosses instead of one. The law is general, and aims at no political party. One party may be affected at one election, and another at another, or all parties may be affected at one election, some in one locality and others in another. It does not prevent coalition between different political parties, which is often very commendable and patriotic. It does not deprive the members of those political parties of

the means to put their coalition into effect by their votes, but furnishes all reasonable facilities for so doing. It only requires some degree of intelligence and care on the part of the voters. We hold the law to be constitutional."

So, in Ohio, the court, in *State ex rel. Bateman v. Bode*, 55 Ohio St. 224, 45 N. E. 195, 60 Am. St. 696, 34 L. R. A. 498, held the statute to be constitutional. The whole case is covered by the following quotation:

"No form of ballot is prescribed by the constitution, and therefore the general assembly is free to adopt such form as in its judgment shall be for the best interests of the state. The election must be by ballot, but the form of the ballot, so long as it is a ballot, is left to the sound discretion of the general assembly. The ballot or ticket in question is clearly a ballot, and therefore does not contravene the second section of the fifth article of the constitution. By the second section of the first article of the constitution, it is provided, in substance, that government is instituted for the equal protection and benefit of the people. It seems clear that the placing of the name of each candidate upon the ballot once, and only once, would be equal protection and benefit to all the candidates. To place the name of one on the ballot in two places, and the name of his opponent in only one place, would not be exactly fair. It would give the candidate whose name appears twice, an advantage over the candidate whose name appears but once. So that the statute, instead of being in conflict with this section of the constitution, is in harmony with it, and may have been passed for the purpose of doing away with this advantage which existed under the former statute. It is a proper regulation of the elective franchise, well calculated to avoid and prevent corruption and fraudulent practices, as well as undue advantage to one candidate over another. But it is argued that the voters have a right to have the names appear upon both ballots, so that they may more easily vote for the candidates of their choice. No legislature and no court can know in advance how the electors desire to vote, and if an opportunity is given them to vote for the candidates of their choice, by placing the names once in plain print upon the ballots, it is all that can in fairness be required. The ballot is the same for all, and gives equal protection and benefit to all. There is no discrimination against or in favor of any one; and if any in-

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equality arises, it arises not from any inequality caused by the statute, but by reason of inequalities in the persons of the voters, and such inequalities are unavoidable."

The same reason is announced in *State ex rel. Fisk v. Porter*, 13 N. D. 406, 100 N. W. 1080, 67 L. R. A. 473, the court saying most aptly:

"The legislature has declared that it shall be printed in but one column. Does this deprive the relator or the electors of any constitutional right? We think not. Counsel have failed to point out any provision of the constitution which is violated, and we know of none."

It was held in the following cases that, in the absence of a controlling statute, the names of a candidate might appear more than once on the same ballot. *Simpson v. Osborn*, 52 Kan. 328, 34 Pac. 747; *Fisher v. Dudley*, 74 Md. 242, 22 Atl. 2; *Müller v. Pennoyer*, 23 Ore. 364, 31 Pac. 830; *Payne v. Hodgson*, 34 Utah 269, 97 Pac. 132. But each of these cases turned upon statutory, and not upon constitutional grounds, and the principle we announce was thereby affirmed as completely as in the cases we have heretofore alluded to. As against the reason and logic of these decisions we have the case of *Murphy v. Curry*, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97, holding that a similar statute was unconstitutional. This case stands alone. It was finally repudiated by a constitutional amendment. The case was decided by a divided court, a bare majority declaring the rule. The court clearly put itself in the place of the legislature and determined the law, not upon constitutional grounds, but rejected it as unwise, impolitic, and inexpedient. The case proceeded upon two false theories, as is made plain by reference to the dissenting opinion of Garoutte, Justice; the one the inconvenience of the voter, and the other the denial of a right to a political party. The writer of the dissenting opinion said:

"Here the question is simply a mere matter of regulation as to the form of the election ballot. By this provision of the law all parties are treated alike, all candidates are treated alike, and all voters are treated alike. Under those conditions

I do not see how the law can be declared unconstitutional. If the *general reasoning* found in the main opinion in this case, as well as in the Britton case, be constitutionally sound, then the whole Australian law of this state will be set aside the first time an assault upon constitutional grounds is made upon it."

The case just cited has heretofore been considered by this court. It was invoked by those who sought to overturn the direct primary law, and because of its conclusion rather than its logic, seems to be a favorite, in fact the only, weapon available to those who would thwart the attempt of the legislature to insure a ballot free of party coercion, by invoking the supposed rights of political parties. The case was repudiated as an authority in *State ex rel. Zent v. Nichols*, and, as far as the writer has been able to find, has never been approved by any of the courts of the several states.

But it nevertheless suggests the only remaining ground to be discussed, and that is that the provision of the Australian ballot law now under discussion deprives a political party of its right to appear upon the ballot. It is urged that, under subd. 3, § 4893, Rem. & Bal. Code, it is the right of every political party to print its full ticket although it contains the names of candidates appearing on other party tickets, and that this section, when considered in connection with the amendment to the direct primary law (Laws 1909, p. 179, § 11; Remington & Ballinger's Code, § 4842), which provides that the names of judges shall appear upon the ticket of all parties holding a joint convention, indicates a legislative intent to supersede or repeal subd. 6, § 4893, subd. 6, being the section which provides that names shall appear but once. The answer to this argument is that a statute will not be held to be unreasonable or in conflict with another, or repealed by implication, unless the legislative intent can be gathered from the later enactment. Courts cannot look to the working of the law or reject it because it does not affect all alike, so long as it covers all who come within its terms in the same way. The legislature having full

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power, then, to make such regulations as it saw fit, the law will not be held to be repealed by implication merely because it does not cover an unforeseen contingency. The legislature foresaw and covered the contingency of a joint or fusion convention, and whether it failed to legislate so as to permit the names of candidates of independent conventions or parties from going on the ballot more than once, from design or oversight, is not within the purview of our inquiry. The remedy is not to strike down the law, but to extend its operation. The remedy is in the hands of the legislature, and not to be sought in the courts.

Recurring again to fundamental principles, the whole argument in this behalf is met by the undisputed proposition that the constitution takes no concern of political parties. The people, in adopting the constitutions, both state and Federal, wisely considered that political parties are evanescent things, born of political emotions and of uncertain—sometimes precarious—tenure of life, and went no further than to protect the elector in his right to cast a ballot; not a coerced party ballot, but for the candidate of his choice, whether he be upon one ballot or another. The same argument, that such laws will tend to destroy party organizations, was made when the direct primary law was attacked two years ago, and was squarely met by this court.

"The last general objection to be noticed is that the law tends to destroy political parties. Counsel confess that they can find no specific provision of the constitution on which to base the contention, but they assert the general utility and necessity of parties, and argue therefrom that legislation tending to destroy them must receive the condemnation of the courts. It has seemed to us, however, that this is a political rather than a judicial question, and that an appeal from the legislative decision must be made to the people rather than to the courts." *State ex rel. Zent v. Nichols, supra.*

In *State ex rel. Runge v. Anderson, supra*, it was said:

"Men are supposed to stand for principles when placed in nomination by political parties, and when the candidates of

one party are identical with those of another it is supposed, and not unreasonably, that for the time being at least, though there be two organizations there is but one platform of principles, and that one party designation on the official ballot will satisfy all legitimate requirements of both. The confusion and uncertainty that would arise in such a case from the double printing of names, furnishes a strong reason for prohibiting it, and that, with the other reason mentioned, strongly support the wisdom of the prohibition as a proper legislative regulation."

Political parties being neither mentioned, protected, nor favored in the constitution, a law will not be held to be unconstitutional, although in its workings it may destroy these organizations. If a party is to be protected at all hazards, the Australian ballot, the primary law, and the commission plan of government must all fall upon the first attack, for the working, if indeed it is not the design, is to break down parties and put the burden entirely upon the elector.

"In other words, the scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders to construct from the top downwards." *People ex rel. Coffey v. Democratic General Committee*, 164 N. Y. 335, 58 N. E. 124.

See, also, *Healey v. Wipf*, 22 S. D. 343, 117 N. W. 521; *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N. W. 961.

Finding no guaranty, express or implied, in favor of either a candidate or a party in the constitution, it follows that he or his party can claim no greater rights than the voter himself. The fountain cannot rise higher than its source. There being no valid constitutional objection to the statute, and being powerless to supply omissions or to whittle the law to meet conveniences or emergencies, it follows that relators must follow the law as it has been written by the legislature, and designate the name of the party under whose name they desire their names to be placed.

The judgment of the lower court is affirmed.

DUNBAR, MOUNT, and CROW, JJ., concur.

RUDKIN, C. J., presided, but took no part.

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Citations of Counsel.

[No. 8872. Department Two. October 20, 1910.]

THE STATE OF WASHINGTON, *Appellant*, v. JACOB
YOUNGBLUTH *et al.*, *Respondents*.¹

BANKS AND BANKING—CRIMES—INSOLVENCY—RECEIVING DEPOSITS—STATUTES—CONSTRUCTION. As a criminal law will not be extended beyond its plain terms, the act of 1893, entitled an act punishing bank officers for receiving deposits knowing the bank to be insolvent, and providing that officers of any "banking institution" so doing shall be guilty of a felony, did not apply to private bankers, but only to incorporated banks; especially in view of the subsequent legislative construction in 1907 (Rem. & Bal. Code, § 3331), extending the law to cover "owners" and in 1909 (Id., § 2640), to cover stockholders and employees.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered March 16, 1910, upon sustaining demurrers to the information, dismissing a prosecution for the crime of receiving deposits in a bank with knowledge of its insolvency. Affirmed.

Augustus Brawley, for appellant, contended that "institution" in the statute has a broader meaning than "corporation." 5 Cyc. 532; 22 Cyc. 1374; *Trustees of the Academy of Richmond County v. Bohler*, 80 Ga. 159, 7 S. E. 633; *Gerke v. Purcell*, 25 Ohio St. 229, 240; *Appeal Tax Court of Baltimore City v. St. Peter's Academy*, 50 Md. 321; *United & Elec. Co. v. Baltimore*, 93 Md. 630, 49 Atl. 655, 52 L. R. A. 772; *Morris v. Lone Star Chapter No. 6, R. A. M.*, 68 Tex. 698, 5 S. W. 519; *Commonwealth v. Gray's Trustee*, 25 Ky. Law 52, 74 S. W. 702; *Warren v. Shook*, 91 U. S. 704; *Trustees of Kentucky Female Orphan School v. Louisville*, 100 Ky. 470, 36 S. W. 921, 40 L. R. A. 119; *Manchester Corporation v. McAdam*, A. C. 500, 61 J. P. 100, 65 L. J. Q. B. 672, 75 L. T. 229; *Hennepin v. Gethsemane Brotherhood*, 27 Minn. 460, 38 Am. Rep. 298.

Million, Houser & Shrauger, for respondent Youngbluth.

¹Reported in 111 Pac. 240.

Quinby & Beagle, for respondent Schafer, contended, *inter alia*, that "banking institution" refers to a body corporate. *Den ex dem State v. Helm*, 3 N. J. L. 600; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Speer v. School Directors of Blairsville*, 50 Pa. St. 150; *Engstad v. Grand Forks County*, 10 N. D. 54, 84 N. W. 577.

CHADWICK, J.—The only question in this case is whether the act of 1893, entitled, "An act punishing bank officers for receiving deposits knowing the bank to be insolvent" (Laws 1893, page 271), applies to private bankers. Section 1 of the act is as follows:

"Any president, director, manager, cashier or other officer of any banking institution who shall receive or assent to the reception of deposits after he shall have knowledge of the fact that such banking institution is insolvent or in failing circumstances, shall be guilty of felony and punished as hereinafter provided."

Defendants, on or about the 24th day of January, 1905, were copartners, and were conducting a private banking institution at Hamilton, in Skagit county. It is charged that they received deposits at a time when the bank was insolvent. The court held, upon demurrer, that the facts did not constitute a crime, and dismissed the proceeding. It is a familiar rule of statutory construction, needing no citation of authority, that a criminal statute will not be extended beyond its plain terms by construction or implication. The title of the act, as well as its phraseology, makes it certain that the legislature had in mind only those banking institutions organized as corporations or associations under existing laws, and doing business by or through officers or agents. The title of the act is directed to officers, and not persons. Individuals do not do business through officers, nor is it to be presumed that copartnerships act through presidents, directors, managers, or cashiers, in the sense in which these words are used to describe officers of a banking institution. It is true that § 2 of the act says, that "any person" violating the

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provisions of § 1 shall be punished, but under the rule of *ejusdem generis*, the word "person" must be held to mean persons of the class described in § 1; that is, president, director, etc.

We find but one case decided upon a statute identical with the act of 1893: *State v. Kelsey*, 89 Mo. 623, 1 S. W. 838. The same point was there raised as is raised in this case, and the decision supports us in our view of the law. Other reasons may be suggested. It will be noticed that the wording of the act is almost, if not quite, the exact language of art. 12, § 12, of the state constitution. Article 12 is entitled, "Corporations other than municipal." The act under scrutiny was passed with reference to this article, showing clearly that it was the intention of the legislature to include within the term "banking institutions" only such incorporated or organized institutions as did business through the officers designated in the constitution itself. At that time it seems, as was said by Judge Folger in *People v. Doty*, 80 N. Y. 225, 235, that the legislature intended that "private citizens should deal with each other in this matter, as in many others, with such freedom or with such caution as each chose to use."

Another reason for our ruling is that the law-making body has itself put the same construction upon the law of 1893. By the act of 1907 (Laws of 1907, p. 526; Rem. & Bal. Code, § 3331), the word "owner" was incorporated into the law; while the legislature of 1909 (Laws 1909, p. 1010; Rem. & Bal. Code, § 2640) re-wrote the law so as to include, not only owners, but stockholders and employees as well. There is no surer test to apply in ascertaining the meaning of a law than contemporaneous construction of an act by the legislature itself, if it can be discovered; for "*contemporanea expositio est fortissima in lege*."

For these reasons, severally and collectively, we hold that the law of 1893 did not apply to individual bankers, and the judgment of the lower court is therefore affirmed.

RUDKIN, C. J., DUNBAR, CROW, and MORRIS, JJ., concur.

[No. 9077. Department Two. October 20, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN W.
PUTNAM, *Appellant*.¹

INTOXICATING LIQUORS—LICENSES — DRUGGISTS — STATUTES — CONSTRUCTION. The act of 1907 (Rem. & Bal. Code, § 6269 *et seq.*), prohibiting the sale of intoxicating liquors by any person without first obtaining a state license in addition to county or municipal licenses, being primarily a revenue measure, is not *in pari materia* and to be construed in connection with the general act of 1888 (Rem. & Bal. Code, § 6275 *etc.*), for the regulation of the liquor traffic, which exempted from its operation druggists dispensing liquors on the written prescription of a reputable physician; hence the provisions of both acts may be enforced, and druggists must procure a state license under the revenue act, although not required to do so under the regulative act.

Appeal from a judgment of the superior court for King county, Yakey, J., entered June 16, 1910, upon a trial and conviction of selling intoxicating liquors without a license. Affirmed.

Blaine, Tucker & Hyland and *Wm. C. Keith*, for appellant.
Geo. F. Vanderveer, for respondent.

DUNBAR, J.—This is an appeal from a judgment of conviction in the superior court of King county, for violating the provisions of chapter 194 of the Laws of 1907, page 419 (Rem. & Bal. Code, § 6269 *et seq.*). The appellant contends that there is no warrant in law for prosecuting him under the provisions of that chapter, for the reason that he is a druggist and is therefore exempt from its provisions, the contention being that the act of 1907 must be construed with reference to the provisions of Rem. & Bal. Code, § 6275, and that the provisions of Rem. & Bal. Code have not been repealed, directly or by implication, by the act of 1907. Section 6275, which is an enactment of the Laws of 1888, being

¹Reported in 111 Pac. 239.

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an act to regulate, restrain, license, or prohibit the sale of intoxicating liquor, is as follows:

"Nothing in this act shall be construed to apply to any pharmacist or druggist so as to prohibit him from or punish him for the dispensing of any spirituous, fermented, malt, or other intoxicating liquors in good faith, upon the written prescription of any reputable physician:" etc.

Section 1 of chapter 194 of the Laws of 1907, page 419, the title of which is: "An act relating to the sale of intoxicating liquors, fixing a state license fee, and providing a punishment for the violation thereof;" is as follows:

"Every person, firm, or corporation selling any spirituous, fermented, malt or other intoxicating liquor, at any place within this state or upon any steamboat, steamship or other vessel plying upon the waters of the state, or between places within the state or upon any dining-car, buffet-car or other public conveyance in this state, shall pay for the privilege of so doing an annual state license fee of twenty-five (\$25) dollars in addition to the license fee fixed by any city, town, or county, where such liquor is sold, which sum shall be in addition to the amount now required to be paid to the state on account of any license for such purpose." Rem. & Bal. Code, § 6269.

The contention of the appellant is that these statutes are *in pari materia*; that the subsequent statute must be construed by reference to the provisions of the prior statute, and as so construed that the licensing act of 1907 is not intended to, and does not, prohibit druggists from selling liquors under the exceptions and exemptions stated in § 6275 of Rem. & Bal. Code; that the legislature did not intend, by passing the law of 1907, to in any way abrogate the law of 1888 and the amendments thereto; announcing the doctrines, that repeals of statutes by implication are not favored by law; that a later statute will never be held to operate as a repeal of an earlier statute, unless the two are so inconsistent or repugnant that they cannot be reconciled; that it is the duty of the courts to so construe them as to avoid such repeal by implication in all cases if such construction can be reasonably adopted; and

that all statutes relating to the same subject should be construed *in pari materia* so as to give them all their appropriate effect and operation, and many cases are cited to sustain this contention.

Conceding the correctness of the abstract propositions of law contended for by the appellant, they are not applicable to, or controlling in, this case; for, in the first place, there is room for grave doubt whether the different enactments in question are *in pari materia*. The law of 1888, so far as druggists are concerned, seems to be a regulation statute. They are simply permitted, under certain requirements and regulations, to sell liquor, no license whatever being required; and the subject of regulation is not made applicable to and does not apply to them. But the act of 1907 is, and purports by its title to be, a revenue law solely. Its object is to raise revenue for the state. There is no suggestion of regulation. It is true, there is a penalty provided; but that is evidently only in aid of the collection of the license fee prescribed. So that it is apparent that the statutes are entirely different and cover different subjects.

But, in any event, the principles of construction contended for by appellant are applicable only where there is doubt or ambiguity, and the act of 1907 is so plain and definite that there is no occasion to resort to any former act to interpret or construe it. It is said by Sutherland in his work on Statutory Construction (2d. ed.), § 450:

"It has been held in a number of cases that if a revision or code is plain and unambiguous it must be construed by itself and without resort to the original or prior acts which have been brought into it:"citing *Hamilton v. Rathbone*, 175 U. S. 414, where the court said:

"The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be ac-

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complished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. . . . Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in a single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity."

When we reflect that the only purpose intended to be accomplished by the act of 1907 was the raising of revenue, and that the act in that respect was clear upon its face, and when standing alone is fairly susceptible of but that one construction, we must concede that this case falls plainly and clearly within the rule announced in the case just quoted. As the two acts do not cover the same field of litigation and there is no repugnance between them, the provisions of both acts are enforceable.

The judgment will be sustained.

RUDDIN, C. J., CHADWICK, MORRIS, and CROW, JJ., concur.

[No. 9060. Department Two. October 27, 1910.]

ARTHUR E. FENTON *et al.*, Respondents, v. CASCADE MUTUAL FIRE ASSOCIATION OF WASHINGTON, Appellant.¹

INSURANCE—NONPAYMENT OF PREMIUM—NOTICE TO MORTGAGEE. A policy of fire insurance, issued and delivered without prepayment of the premium, is an executed contract, and the presumption is that credit was given and the time for paying the premium extended, and if payable to a mortgagee, it cannot be forfeited without notice to the mortgagee and demand.

INSURANCE—CHANGE OF OWNERSHIP—INCUMBRANCE. Where a policy of fire insurance was made payable to a specified mortgagee, "as interest may appear," the giving of a second mortgage to the same

¹Reported in 111 Pac. 343.

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mortgagee to secure a further loan is not a breach of the conditions against change of ownership, increase of hazard or subsequent incumbrance, the policy meaning "as interest may appear" at the time of the loss.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 25, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on a policy of fire insurance. Affirmed.

Govnor Teats, Hugo Metzler, and Leo Teats, for appellant, cited: *Connecticut Fire Ins. Co. v. Manning* 160 Fed. 382; *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 145, 39 N. E. 757; *Koshland v. Home Mut. Ins. Co.*, 31 Ore. 321, 49 Pac. 864, 50 Pac. 567; *Atlas Reduction Co. v. New Zealand Ins. Co.*, 138 Fed. 497, 9 L. R. A. (N. S.) 433; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400; *Johansen v. Home Fire Ins. Co.*, 54 Neb. 548, 74 N. W. 866.

C. E. Stevens and H. T. Granger, for respondents.

DUNBAR, J.—The following brief statement, we think, will be sufficient for the determination of the questions involved, without mentioning some details set forth in the statement of counsel. The respondents owned a house in the city of Tacoma, and mortgaged the same, with the land on which it was built, to one Bertha L. Leigh, for the sum of \$750. The respondents had the property insured by appellant, on July 17, 1908, for the sum of \$750. The business was done through C. L. Johnson, an agent of Bertha L. Leigh. Johnson informed the appellant company of the fact that Mrs. Leigh had a mortgage on the property in the sum of \$750, and the company attached a rider containing a mortgage clause in the following words:

"Loss or damage, if any, under this certificate shall be payable to Bertha L. Leigh of the city of Tacoma, State of Washington, mortgagee (or trustee) as interest may appear."

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On November 25, 1908, Fenton borrowed an additional \$250 from Mrs. Leigh, and gave another and second mortgage to cover such sum. On May 2, 1909, the property in question was completely and totally destroyed by fire, and plaintiffs thereupon for the first time were notified by the insurance company that the premium had not been paid. The plaintiffs then tendered the amount due, which was refused, and suit was brought for the amount due on the policy. Trial was had, which resulted in a verdict for plaintiffs as prayed. Findings of fact were made and conclusions of law followed, and judgment was entered for the plaintiffs in the sum of \$750, less the amount of the premium which had been tendered.

There are some exceptions taken to the findings of fact, but an examination of the record satisfies us that they are borne out by the testimony. There are two propositions relied upon by the appellant in this case: (1) Nonpayment of the premium prior to the loss; and (2) that the giving of the second mortgage avoided the policy. In relation to the first proposition, the testimony shows that it was simply a misunderstanding that prevented the payment of the premium; that the respondents thought the premium was paid, until the loss occurred, and had not been notified to the contrary by the appellant, and that no demand had ever been made upon him for the payment of the premium. The policy had been issued and delivered in accordance with the application. Under all authority it then became an executed contract, and under such circumstances, the presumption attaches that credit is given and time for payment extended. 19 Cyc. 606, and cases cited.

As to the second proposition, stripped of any modification in the contract, the giving of the second mortgage would probably render the policy void under the provisions of the contract that the mortgagee should notify the association of any change of ownership or increase of hazard, etc. But, as is well contended by the respondents, this and kindred

provisions are modified and limited by the further provision in the contract that the loss and damage under the contract should be paid to Bertha L. Leigh, mortgagee, as interest may appear, the appellant having been notified at the time the policy was issued that Bertha L. Leigh was mortgagee in the sum of \$750. There also appears in the contract the following:

"If with the consent of this association an interest under this certificate shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of the insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon and attached or appended hereto."

The contention of the appellant is that the giving of the second mortgage to Bertha L. Leigh violates the provisions against subsequent incumbrance. But in view of the provision quoted above, the determination of the whole question rests upon the meaning of the phrase "as interest may appear," the contention of the appellant in that regard being that it should be construed to mean, as her interest appeared at the time the policy was issued. This, we think, is not the proper construction. It should be construed to mean such interest as by proper proofs is shown to appear at the time of the loss.

Nor do we think the authorities cited by appellant sustain its contention in a case of this kind. As pointed out by respondents, the case of *Atlas Reduction Co. v. New Zealand Ins. Co.*, 138 Fed. 497, cited by appellant in discussing this particular question, announces a rule exactly opposed to the contention of the appellant. In referring to the contention of plaintiff's counsel in that case, the court said:

"Doubtless this would be a proper interpretation of the words 'as their interest may appear,' if they stood alone or were controlling. They are plainly prospective, and refer, not to an interest existing at the time when the indorsement

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was written, but to such interest as may appear at the time of the loss, if any, without regard to the character of the interest, or the time it may have arisen."

In this case the words do stand alone, so far as any interpretation of their meaning is concerned. The case quoted was decided against the insured, but because there was a plain violation of a distinct and unqualified provision. And so with the other cases cited.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 9157. Department One. October 27, 1910.]

WILLIAM THILL, *Respondent*, v. ADAM JOHNSTON *et al.*,
Appellants.¹

SPECIFIC PERFORMANCE—CERTAINTY—LOGS AND LOGGING—SALE OF TIMBER—TIME FOR REMOVAL. A land and timber contract is sufficiently certain, as fixing the time for the removal of timber at the end of eight years, to authorize specific performance thereof, where the clause giving the grantee of the timber six years for removal is immediately followed by a provision that the owner of the land is not to clear the lands among the merchantable fir and cedar timber until after six years, and that all timber on said premises at the end of eight years from date shall revert to the owners of the land.

FRAUDS, STATUTE OF—INTEREST IN LAND—SALE OF TIMBER. An oral agreement abrogating a written contract for standing timber is void, as it involves an interest in land which must be in writing.

FRAUDS, STATUTE OF—INTEREST IN LAND—PART PERFORMANCE—PAYMENT. Payment of the consideration of an oral contract for an interest in land is not such a part performance as to take the case out of the operation of the statute of frauds.

Appeal from a judgment of the superior court for Thurston county, McMaster, J., entered February 11, 1910, upon findings in favor of the plaintiff, after a trial on the merits

¹Reported in 111 Pac. 225.

before the court without a jury, in an action for specific performance. Affirmed.

Thomas M. Vance and Harry L. Parr, for appellants.

Troy & Sturdevant, for respondent.

PARKER, J.—This is an action to enforce specific performance of the following contract:

“This agreement executed in duplicate this 2d day of November, 1903, by and between William Thill, party of the first part, and Adam Johnston and Matilda Johnston, parties of the second part, all of Thurston county, Washington, witnesseth:

“That whereas on November 2d, 1903, party of the first part and party of the second part, Adam Johnston, agreed to purchase the following described property to wit: E $\frac{1}{2}$ of NE $\frac{1}{4}$ and N $\frac{1}{2}$ of SE $\frac{1}{4}$ section 14, township 16 north, range 2 west, W. M., in Thurston county, Washington, from James Swan and Stella M. Swan, husband and wife, the purchase price being eight hundred dollars (\$800) in said contract, three hundred dollars (\$300) of which was paid down and the remaining five hundred dollars (\$500) to be paid on or before November 2d, 1907, according to the terms of said contract; and

“Whereas, party of the first part and party of the second part Adam Johnston each paid one hundred and fifty dollars (\$150) of said three hundred dollars (\$300) paid down on said contract,

“Now, Therefore, it is mutually agreed between the party of the first part and parties of the second part that the party of the first part is to have the said land above described, and parties of the second part are to have all the merchantable timber on the said land. Parties of the second part are to have six years within which to remove said timber from said premises. Party of the first part agrees for a period of six years not to clear land in and among said merchantable fir and cedar timber. After six years from date party of the first part is to have the right to clear land within the area covered by said merchantable fir and cedar timber. All timber on said premises at the end of 8 years from date is to revert to and become the property of party of first part. Party of the first part is to pay two hundred and fifty dollars

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(\$250) of the remaining portion of the purchase price of said premises on the said contract with said James Swan and Stella M. Swan and parties of the second part are to pay two hundred and fifty dollars (\$250) of said purchase price on said contract. If said parties of the second part remove said timber at any time before November 2d, 1907, at such time they are to pay said two hundred and fifty dollars (\$250) required to be paid by them upon said contract with said James Swan and Stella M. Swan. At time deed of said premises is received from said Swans, parties of the second part will deed their interest in land to party of first part, reserving timber therefrom, but if timber is removed before deed from Swans then parties of second part will deed same premises to party of first part at such time.

"In witness whereof the parties hereto have hereunto set their hands and seals this 2d day of November, 1903.

"Witnesses: William Thill (Seal)

"P. M. Troy. Party of the first part.

"A. J. Falknor. Adam Johnston (Seal)

"Matilda Johnston (Seal)

"Parties of the second part."

The execution of this contract was duly acknowledged by all the parties. The deed from Swan and wife having been given conveying the land to the parties to this contract, the plaintiff demanded of the defendants a deed in compliance with its terms, and the defendants having refused to make such deed, this action followed. A trial before the court resulted in a decree in favor of the plaintiff, in substance directing a conveyance of the defendants' undivided one-half interest to the plaintiff, reserving to the defendants all the merchantable timber on the land with the privilege of removing the same at any time on or before November 2, 1911, that being the date of the expiration of the eight years specified in the contract. From this disposition of the cause, the defendants have appealed.

It is contended in behalf of appellants that the contract is too uncertain in its terms to entitle respondent to a decree of specific performance, in that the time for the removal of the timber is uncertain. Passing the question of such uncertainty

rendering the contract unenforceable, we think that, in view of all the provisions of the contract relating to the removal of the timber, it can readily be seen that the parties intended the appellants to have eight years for that purpose without forfeiture of their rights to the timber. The six-year clause standing alone would seem to indicate otherwise, but following that clause are the words: "After six years from date party of the first part is to have the right to clear land within the area covered by said merchantable fir and cedar timber." These words clearly indicate that the appellants were still to have some right on the land after the expiration of the six years named, and by the language following this clause of the contract it is evident that such right consisted of the right to the timber for two years longer subject to this clearing right. This necessarily gave them the right to go upon the land and remove the timber during that time. We are of the opinion that the contract is sufficiently certain to warrant a decree of specific performance.

It is contended that the learned trial court erred in not permitting the appellants to show that this contract was abrogated by a new contract. The offers of proof on this subject consisted only of oral testimony tending to show that the parties had abrogated the contract by making a new one. No competent evidence was offered to show that any new contract having any effect upon the original one was made in writing. This original contract being for the conveyance of an interest in real property, it was, of course, required by law to be in writing. *Nichols v. Opperman*, 6 Wash. 618, 34 Pac. 162; *Brewer v. Cropp*, 10 Wash. 136, 38 Pac. 866; *Swash v. Sharpstein*, 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796; *Graves v. Graves*, 48 Wash. 664, 94 Pac. 481.

Counsel for appellants invoke the general rule that a written contract may be abrogated or modified by a subsequent parol contract made between the same parties, citing, *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098. This rule, however, does not authorize the abrogating of a

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contract by a new parol contract when the original contract is by law required to be in writing. Such a contract cannot be abrogated or rescinded by a parol contract, except such new parol contract is accompanied by acts of part performance sufficient to take it out of the requirement of the law that it shall be in writing. *Spinning v. Drake*, 4 Wash. 285, 80 Pac. 82, 31 Pac. 319.

It is suggested that the offers of proof included a showing of part performance of the new contract. The only acts of part performance which we regard as at all referable to the new contract sought to be shown was payment of the consideration therefor, but this of itself is not sufficient to take the place of the requirement of the law that such contract shall be in writing. *Chamberlain v. Abrams*, 36 Wash. 587, 79 Pac. 204. Other contentions of appellants are wholly without merit, and do not require discussion. We are of the opinion that the decree of the learned trial court should be affirmed, and it is so ordered.

RUDKIN, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9069. Department Two. October 28, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. ANTON
BELTNER, *Appellant*.¹

WITNESSES—COMPETENCY—HUSBAND AND WIFE—INCEST. The wife is not a competent witness against the husband in a prosecution for incest, under Rem. & Bal. Code, § 1214, providing that a wife shall not be competent to testify against the husband without his consent, except in a prosecution for a crime committed against her.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered June 21, 1910, upon a trial and conviction of incest. Reversed.

¹Reported in 111 Pac. 344.

Chas. S. Lyons, for appellant.

J. L. McMurray, *A. O. Burmeister*, and *F. G. Remann*, for respondent.

PER CURIAM.—Appellant was tried and convicted of the crime of incest. His wife was sworn as a witness and testified against him. Exceptions were taken, and from a verdict of guilty, this appeal is prosecuted. This appeal is controlled by the following decisions of this court: *State v. Kephart*, 56 Wash. 561, 106 Pac. 165; *State v. Kniffen*, 44 Wash. 485, 87 Pac. 837, 120 Am. St. 1009, as well as the statute (Rem. & Bal. Code, § 1214).

It is contended, however, that *Lord Audley's Case*, 3 State Trials, 402, points an exception to the rule, and that where it appears that the testimony cannot otherwise be had, the testimony of the wife is competent upon the ground of necessity. But we do not read the case in that way. The facts show that the testimony of the wife was received because she was the victim of personal violence, bringing the case in harmony with the terms of our statute, which is but declaratory of the rule and exception noted by Lord Mansfield, that the necessity must be not a general necessity but a particular necessity, as where, for instance, the wife would be otherwise exposed without remedy to personal injury.

The judgment of the lower court is reversed, and a new trial ordered.

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[No. 9167. Department One. October 28, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. W. H. SMITH,
Appellant.¹

LARCENY—INFORMATION—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS.
Under a prosecution for the larceny of meat, groceries and other articles of food supplies, evidence of the misappropriations of gunny-sacks is inadmissible; and the error is intensified by instructing the jury that before finding the defendant guilty of stealing gunny-sacks, they must find that they were of some appreciable value.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered March 22, 1910, upon a trial and conviction of petit larceny. Reversed.

Gordon Mackay and Sam P. Ridings, for appellant.

John M. Wilson, for respondent.

MOUNT, J.—The appellant was convicted of the crime of petit larceny, under an information charging that he

“Did unlawfully and feloniously, and with intent to deprive and defraud the owner thereof, steal, misapply, and appropriate to his own use certain property, consisting of meat, groceries, and other articles of food supplies, belonging to the Molbery Lumber & Shingle Company, and being of the value of \$100 and upward,” etc.

He appeals from the sentence pronounced on the verdict.

Several questions are argued, but all are without merit except the one hereinafter considered. During the progress of the trial, the court, over the objection of the appellant, received evidence to the effect that defendant sold at different times and in the aggregate one hundred and ten gunny-sacks at three cents apiece. After this testimony was given, the appellant moved the court to strike it out, for the reason that it was irrelevant and immaterial and was not included in the information. In denying the motion, the court said: “I think the jury can judge as well as the court

¹Reported in 111 Pac. 342.

can whether these are groceries or not." This ruling was clearly error. The defendant was accused of stealing and misappropriating "meat, groceries, and other articles of food supplies." Gunnysacks, as such, are not meat, groceries or articles of food supplies, and would not be commonly so considered. The court erred in receiving the evidence, and should, therefore, have stricken it out.

It appears, that the defendant and his wife had been employed by the Molbery Lumber & Shingle Company to do cooking for men employed by that company; that during the time of this employment certain meat, bread, and meals had been sold by appellant to certain persons. It was claimed by the prosecution that these sales were made in violation of orders, and that the appellant had failed to account for the proceeds thereof. The appellant testified that he was authorized to make certain sales of such articles, and that he fully accounted therefor. The appellant admitted, however, that he had authorized his little boy to gather up certain old gunnysacks around the camp and to dispose of them, and that no account was made thereof. In instructing the jury upon this question, the court said:

"There has been some testimony in this case with reference to the sale by the defendant of certain gunnysacks, with reference to which you are advised and instructed that, before you can find the defendant guilty of appropriating or stealing said gunnysacks, you must find from the evidence beyond a reasonable doubt that said gunnysacks were of some appreciable value, and were intrusted to the defendant and misappropriated as stated in the information."

This instruction intensified the error of receiving the evidence above stated, because it assumes that the defendant was charged by the information "with appropriating or stealing said gunnysacks," when such was not the case, and there was no such issue presented by the information. In view of the conflicting character of the evidence upon the items charged in the information, the jury might well have believed, and probably did believe, that this was the only item

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upon which conviction could be based, and for that reason returned the verdict which was rendered.

The judgment must be reversed, and the cause remanded for a new trial.

RUDKIN, C. J., FULLERTON, GOSE, and PARKER, JJ., concur.

[No. 9051. Department One. October 29, 1910.]

EMMA E. LAFFOON *et al.*, Appellants, v. S. R. BALKWILL
et al., Respondents¹

TRUSTS—PARTITION—RIGHTS UNDER CONTRACTS—DISCRETION OF TRUSTEES—CONTROL BY COURTS—DEDICATIONS—PLATS—VACATION. In the absence of fraud or manifest error from which fraud would be inferred, the courts will not control the discretion of trustees, under a trust agreement whereby lots and fractional lots in an addition not conforming to adjacent streets were conveyed to the trustees to secure vacation of the plat and to replat and thereafter distribute the new lots among the grantors as their general interest may appear, considering and preserving the rights, both legal and equitable of all, with power to assess owelty or benefits if deemed necessary to an equitable partition; and it is not necessary that the trustees consider the vacated portion of streets as additions to abutting property, where they estimated the relative value of the old lots and fractions and partitioned to the owners a proportionate part of the estimated value of the new lots as replatted.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered March 24, 1910, upon findings in favor of the defendants, after a hearing on the merits before the court, dismissing an action to enjoin the execution of a trust agreement. Affirmed.

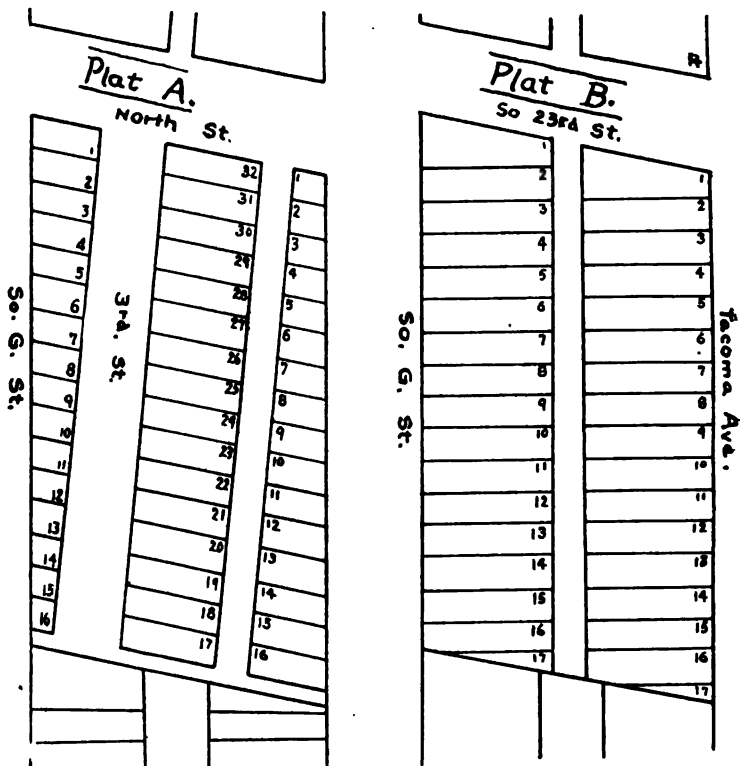
Chas. S. Lyons and *R. F. Laffoon*, for appellants.

Stallcup & Keyes and *Ernst Hoppe*, for respondents.

RUDKIN, C. J.—The plaintiffs and the defendants in this action, other than the defendants Balkwill, Wolbert and Schinn, are the owners of certain lots and fractional lots in

¹Reported in 111 Pac. 455.

Byrd's addition to the city of Tacoma, lying south of North street, between Tacoma avenue and South G street. The original streets in Byrd's addition did not conform to the adjacent streets of the city, and some years ago Tacoma avenue and South G street were extended through the addition, leaving fractional lots on the west side of Tacoma avenue and on the east side of South G street, with Third street, an alley, and a full row of lots intervening, as will appear from the following plat designated "Plat A":



The owners of the lots and fractional lots shown on "Plat A" were desirous of making a replat of the land to conform to the adjacent streets and alleys. In order to accomplish this object the several lot owners conveyed their holdings to

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the defendants Balkwill, Wolbert, and Schinn, as trustees, coupled with an agreement or stipulation prescribing the mode or manner in which the trust should be executed. The trust deed and trust agreement recited the purposes of the trust, authorized the trustees to procure a vacation of the existing plat, replat the property, and redistribute the same among the several owners as their general interests might appear. The provisions of the trust agreement, so far as material to our present inquiry, are as follows:

"It is further agreed that upon the conveyance of all of the tract as herein provided, the trustees shall cause the street and alley therein to be vacated and proceed to replat the tract into lots and blocks in accordance with the lots and blocks of the adjacent property and to dedicate a proper alley therein; to have such replat accepted by the city of Tacoma, and filed in the office of the auditor of Pierce county; and that when such replat has been accepted and filed as aforesaid, the said trustees shall partition said tract, according to said replat, and distribute such lots and blocks among the parties hereto, as their general interests may appear, considering and preserving the rights and interests, both legal and equitable of each and every of the parties hereto, and to convey to said parties their respective parts, parcels and amounts, according to such replat.

"It is further understood that the said trustees in making such partition may assess *owelty* or benefits in favor of or against any lot or lots, or parts of lots, as they may deem necessary to a fair, just and equitable partition among the general owners.

"It is further understood that upon the replat of said tract the trustees shall appraise the lots and fractional lots, if any, at their fair and reasonable value in money, without regard to the improvements thereon, if any, at as near their market value as can be ascertained.

"It is further understood that the improvements now upon any part of said tract shall not be removed or disturbed by the trustees; but that the owners of any of such improvements (buildings or other structures) shall have the preferred right to purchase the land, lot or lots or parts of lots, upon which such improvements rest, in case the same shall not have been allotted to him in the partition; provided he shall take

the whole of the allotment on which said improvement may rest. If such owner shall elect not to purchase, as aforesaid, at the appraised price, then he shall remove his improvements onto his own allotment at his own expense, and within such reasonable time and in such reasonable manner as the trustees shall direct.

"It is further understood and agreed that if the foregoing plan shall appear inadequate to effect the purposes of this trust, then the said trustees shall adopt such other plan or scheme of partition as will enable them to make a fair, just and equitable partition of said tract in accordance with the law and the rights of the parties hereto. That said trustees shall have and they are hereby given full and ample power to carry out this trust."

In the execution of the powers conferred upon them, the trustees caused the city to vacate the existing plat and filed a replat of the property, of which "Plat B," *supra*, is a fair illustration. The trustees then adopted the following plan for a redistribution of the property to the several owners and parties in interest: They viewed the premises, appraised the value of each lot or fractional lot, as shown on the old or original plat, at its fair market value, and fixed the value of all property on the old plat at the sum of \$21,000. They next appraised the value of the several lots, as shown on the new plat, at their fair market value, and fixed the value of all such lots in the sum of approximately \$30,000, or an increase of \$9,000 over the old appraisalment. They now propose to reconvey to the owners of the several lots and fractional lots in the old plat, lots or parts of lots in the new plat, equal in value to the property owned in the old plat, and in addition thereto sufficient other property to make up to each owner the proportionate share of the increased value caused by the replat. To illustrate: If A owned property in the old plat of the appraised value of \$2,100, he will receive property in the new plat of the appraised value of \$2,100, and in addition thereto 2100-21000 or 1-10 of the \$9,000 increase caused by the replat.

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The present action was instituted by the owners of a part of the property in the old plat, against the owners of the remainder of such property and the trustees, to restrain the latter from carrying out or executing their proposed plan of distribution. From a judgment dismissing the action, the present appeal is prosecuted.

It is perhaps unnecessary to describe the property originally owned by the several appellants, further than to say that it was property abutting on Third street which has been vacated. The principal contention of the appellants is that when Third street was vacated, one-half the street reverted to or vested in the property owners on either side of the street, and that this increase in the holdings of the abutting owners was not taken into consideration in the proposed plan of distribution. This contention is, in our opinion, untenable. Where a street or alley is vacated, no doubt the property in the street, as a rule, reverts to or vests in the abutting owners in equal parts, but this is not such a case. The streets and alleys in the old plat could only be vacated through the co-operation of the several owners and the city, and the property was all conveyed to trustees in order that this object might be accomplished. As soon as the street was vacated, title to the property in the street vested in the trustees for the purposes of the trust. The parties to the trust agreement might have agreed definitely upon a plan of distribution so as to leave no discretion in the trustees, but such a plan was perhaps deemed impracticable. At least the parties did not see fit to place any limitations or restrictions on the powers of their agents. The discretion vested in them was a very broad one, and that discretion the courts will not and cannot control in the absence of fraud or manifest error from which fraud might be inferred. There is no pretense in this cause that the trustees have acted fraudulently. A court of equity is simply asked to substitute its judgment and discretion for the judgment and discretion which the parties have voluntarily placed in other hands. This the courts uniformly decline to do.

Such was the conclusion of the court below, and its judgment is affirmed.

FULLERTON, MOUNT, PARKER, and GOSE, JJ., concur.

[No. 9150. Department Two. October 29, 1910.]

E. E. PETERSON, *Respondent*, v. TACOMA RAILWAY & POWER COMPANY, *Appellant*.¹

STREET RAILROADS—FRANCHISES—FARES—CONTRACTS—MUNICIPAL CORPORATIONS—ORDINANCES—ANNEXATION OF TERRITORY—EFFECT. A franchise ordinance requiring a street railway to transport passengers from any point within the city limits on any line of the company to the terminus of its line, and to issue transfers for a continuous trip one way to and from all lines for a single fare of five cents, enacted pursuant to a peace contract entered into to settle disputes and correct abuses relating to transfers and fares, is operative over territory subsequently annexed to the city; and, upon annexation, embraces an existing line, formerly outside the city limits, over which the company was operating cars as a part of its city system under a county franchise, the county franchise being abrogated by the annexation and contract.

SAME—OBLIGATION OF CONTRACT. Such an ordinance does not impair the obligation of any contract.

SAME—ORDINANCES—CONTEMPORANEOUS CONSTRUCTION. Such an ordinance not being doubtful, contemporaneous construction by the city, or acquiescence therein, cannot be worked to aid in its interpretation.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered June 18, 1910, in favor of the plaintiff, upon an agreed statement of facts, in an action by a passenger for wrongful ejection from a street car. Affirmed.

B. S. Grosscup (Jas. B. Howe and Wm. C. Morrow, of counsel), for appellant.

Fitch & Jacobs (T. L. Stiles, of counsel), for respondent.

¹Reported in 111 Pac. 338.

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CHADWICK, J.—In its inception the present Tacoma Railway & Power Company acquired control of various lines of street railway operating under a number of distinct franchises in the city of Tacoma. These lines operating independently were under no obligation, unless so provided in the franchise, to exchange or transfer passengers from one to the other. In consequence great confusion was put upon the citizens. Transfers would be allowed, some from one line to another, and denied upon the same lines to others. Transfers would be allowed at certain points and denied at others. The growth of the city demanded a correction of these abuses, and to save further trouble and disputes, the Tacoma Railway & Power Company and the city of Tacoma entered into a contract in which mutual promises and concessions were made. We shall quote the parts of the contract pertinent to the present inquiry, together with the preamble of the ordinance authorizing the commissioner of public works to enter into it:

“An ordinance authorizing and directing the commissioner of public works of the city of Tacoma to enter into a contract for and on behalf of said city with the Tacoma Railway & Power Company . . . for the settlement of certain differences and disputes heretofore existing between said city and said company. . . .

“Fifth. On and after the first day of April, 1908, the said party of the first part shall transport any person from any point or place within the corporate limits of the city of Tacoma, on any line or lines of street railway owned, operated or controlled by said party of the first part, to the terminus of its line in Point Defiance Park, for a single fare not exceeding five cents, and the party of the first part agrees that it will from and after the date of this agreement, extend its present transfer system for a continuous trip one way to and from all lines within the city of Tacoma (and including that portion of the Point Defiance line outside of the city of Tacoma), but nothing in this section shall be so construed as to require the issuance of transfers which can be so used on parallel or other lines as to make it possible for a passenger to make a round trip for one fare, nor to prevent the party of the first part from making and enforcing all rea-

sonable rules and regulations necessary, in its judgment, to prevent fraud. . . .

"Seventh. And said party of the first part further stipulates, agrees and consents to and does hereby waive and relinquish each and every right, privilege and authority conferred and granted in and by any street railway franchise now held and owned by said party of the first part to the extent only that the same are inconsistent and in conflict with the terms, conditions and provisions of these articles of agreement.

"Eighth. That said city of Tacoma, the party of the second part, for and in consideration of the foregoing agreements made and to be executed by the party of the first part, does hereby agree that upon the proper execution, in duplicate, and delivery of this agreement, by each of said parties to the other, to give its consent, by ordinance, to the transfer and assignment of all the right, title and interest in and to each and every of these certain franchises granted by the city of Tacoma for street railway purposes, which the said party of the first part may now own, either as the original grantee or as assignee."

So far as the record shows, no dispute has arisen between the city and the railway company, excepting in so far as the contract may be held to apply to the following condition: A part of one of the railway company's acquired lines runs beyond the city limits about a mile, terminating at the village of Fern Hill, a suburb of the city of Tacoma. From the point where this line crosses the city limits to Fern Hill, the road was operated under a franchise granted by the commissioners of Pierce county, and the company had been accustomed to charge an additional fare of five cents for a passenger going beyond the city limits, and also an additional fare of five cents for each passage initiated beyond the city limits. So that the fare to or from the village of Fern Hill was ten cents, instead of the customary five-cent fare charged on all other lines in the city. On July 9, 1909, the city passed an ordinance under which the limits of the city were extended so as to take in additional territory. The line of the railway from the city limits to Fern Hill was in the included area.

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It is the contention of the railway company that the line from the old city limits to Fern Hill, being built and operated under a county franchise and being beyond the legislative jurisdiction or contractual power of the city at the time the contract was made, and further that the spirit and terms of the contract as well as its object were to cover only existing disputes, it still has a right to charge a ten-cent fare to and from Fern Hill. The city contends that the object of the contract was not only to cover existing differences, but to insure a five-cent fare within the city limits of Tacoma whenever and wherever the limits of the city might be extended; that the burden follows the benefits of the original franchise as well as the contract, and the added territory being now a part of the city of Tacoma, the company is bound to carry all passengers within the present city limits for a flat five-cent fare. Thus disputing, the parties came to the superior court of Pierce county, where it was decided that the company could charge a five-cent fare and no more.

Certainty is the strength of the law, and it is proper to look to our own decisions, as well as those of other states, for guidance in our interpretation of the contract. But one case has been decided by this court involving a like principle. *Seattle Lighting Co. v. Seattle*, 54 Wash. 9, 102 Pac. 767. In that case the franchise was a general grant to lay pipes "throughout the city of Seattle and throughout any addition thereof," and "as the boundaries thereof are or may be extended." It was held that the company could operate under its franchise in new territory beyond the old city limits, and that it was not confined by the terms quoted to unplatted area within the boundaries existing at the date of the franchise. The court followed the leading case upon this theory of the law. *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121, and other apt authority. The argument of the court was further sustained by the assertion of a rule deduced from the following authorities: *Toledo v. Edens*, 59 Iowa 352, 13 N. W. 313; *Indiana R. Co. v. Hoffman*,

161 Ind. 593, 69 N. E. 399; *McGurn v. Board of Education*, 133 Ill. 122, 24 N. E. 529. The court said:

"It seems clear that, when new territory is brought into a city, general ordinances of the city immediately control the new as well as the old territory, and do not require express legislative action to give them such application. . . . An ordinance granting a franchise generally stands upon the same footing as any other ordinance of the city." *Seattle Lighting Co. v. Seattle*, *supra*.

The case of *Indiana R. Co. v. Hoffman* is quite in point. A contract similar in terms, and designed to cover substantially the same disputes, was entered into between the company and the city. It was agreed that the company would,

"issue transfer tickets free of charge to all passengers requesting the same who boarded its cars at any point upon its line within the limits of the city of South Bend, and whose destination might be upon any point upon any other line of appellant within the said city limits; such transfer tickets to be valid only upon the next car leaving upon the line indicated thereon after the issuing of the same."

The limits of the city being thereafter extended, it was contended that the company was not bound to issue transfers except to such passengers as initiated their right within the boundaries of the city as they existed at the time of the franchise. The court held:

"It is apparently insisted by counsel for appellant that the city of South Bend, by annexing the part of the territory in which appellant, under the grant from the board of commissioners, had previously operated its road, abrogated and destroyed its rights acquired by said grant, and therefore violated our fundamental laws. But whatever rights appellant had in said territory under its grant from the board of commissioners were not impaired or destroyed by the extension of the city boundary in question, but were changed by its agreement with the city to issue transfer tickets over its lines therein to all points within the city limits. Whatever rights it had to decline or refuse to issue transfers to persons carried over its road in said territory were merged in and controlled by the contract which it subsequently made with the city. If

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appellant desired to stand upon and avail itself of the rights which it had acquired in the territory in question, it ought not to have entered into the agreement and contract with the city in regard to the rate of fare and the right of passengers to transfer. The regulation of the question of fare and the transfer tickets to be issued rests upon the contract in this case between appellant and the city of South Bend. It bound itself thereby not to exact of passengers transported over its lines within the city more than the maximum fare, and to issue, upon request, to such passengers, transfer tickets as provided. This agreement as we have seen, cannot be held to apply only to passengers who are transported on appellant's cars within the old limits of the city, but must be held to apply to and include any and all passengers whose destination is within the limits of the city as they were extended by the annexation of the territory in controversy. This extension, as we have said, by the municipal authorities was the exercise of governmental powers. In a legal sense the city is a unit, although its boundaries may be changed from time to time by extension, and all persons within the limits thereof as extended become bound by, and must yield obedience to, its ordinances. It certainly in reason cannot be asserted that an ordinance adopted by a city must, in its operation, forever be confined to the limits of the municipality as they were at the time it was passed, and cannot become operative in territory thereafter annexed and made a part of the corporation."

In *People v. Detroit United R. Co.* (Mich.), 125 N. W. 700, it was held on the principle announced in the *Hoffman* case, that notwithstanding a franchise to build and operate within the city limits had been granted, a road running beyond the city limits, and acquired by purchase and over which the limits of the city had thereafter been extended, came within the terms of the company's contract to carry passengers at a fixed rate, and that an increased fare could not be exacted. The court said:

"We think it not unreasonable to hold that this mutual contract was made in view of the power of the legislature of the state to increase or diminish the territory within the city,

and that neither the city nor the company contemplated that in case of an extension of the lines of the company within the city, either by purchase or acquisition from another company, an increased fare should be demanded."

The spirit of the contract—and we do not have to repudiate any of its words to so hold—was to insure a fixed fare within the limits of the city of Tacoma at all times; for we cannot assume, in the absence of controlling words, that either the railway company or the city intended to settle merely existing disputes and leave the way open for a continual recurrence of the same troubles; for it is within the knowledge of all men that the municipalities of this state are growing rapidly, and the same difficulties would necessarily and within a short time beset the participants. It was a contract for continuing peace. As was said in *Truesdale v. Newport*, 28 Ky. Law 840, 90 S. W. 589:

"The contract is to supply the city of Newport and its inhabitants with gas. The limits of the city year by year determine the limits of the contract."

In *People ex rel. Chicago v. Chicago Tel. Co.*, 220 Ill. 238, 77 N. E. 245, it is said:

"The words of the ordinance are clear and not ambiguous, and apply to all the territory within the city of Chicago during the period of the grant. The ordinance having been accepted by the defendant became a contract by which both parties were bound, and the territory which has since been annexed to the city is within the city of Chicago. If there had been an intention to restrict the limitations to the existing city limits, such an intention would naturally have been expressed in the ordinance or the acceptance."

It will be seen under this authority that, if we found the contract to be doubtful, it would be our duty to resolve it in favor of the city, for franchises are to be construed in favor of the public, unless controlled by law or the saving clauses of the contract. McQuillan, *Municipal Ordinances*, § 578; 9 Cyc. 588. It is unnecessary to quote from other cases. The

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principle we have adopted is sustained by the following cases: *Des Moines Waterworks Co. v. Des Moines*, 95 Iowa 348, 64 N. W. 269; *St. Louis etc. R. Co. v. Houck*, 120 Mo. App. 634, 97 S. W. 963; *Illinois Cent. R. Co. v. Chicago*, 176 U. S. 646.

As against this array of authority, appellant cites and relies upon the case of *Turners Falls Fire Dist. v. Millers Falls Water Supply Dist.*, 189 Mass. 263, 75 N. E. 630. It may be that this case sustains the contention of appellant, but no authority is cited outside of the supreme court of Massachusetts. It is opposed to our notion of the law, and we are not willing to follow it. The case of *Chope v. Detroit & Howell Plank Road Co.*, 37 Mich. 195, 26 Am. Rep. 512, is also relied upon. We believe this case to be controlled, if not positively overruled, by the later case of *People v. Detroit United R. Co.*, from which we have quoted. Counsel for appellant seeks to distinguish the Michigan cases, asserting that the court in the later case erroneously assumed as a matter of fact that the boundary of the grant moved with the city limits as they changed from time to time. If this were an assumption of fact, counsel's theory would be correct, but we conceive it to be a legal conclusion. At any rate, we so held in the case of *Seattle Lighting Co. v. Seattle*. The case of *Toronto R. Co. v. Toronto*, 37 Can. Sup. Ct. 430, 5 Can. R. Cases, 250, is also relied upon. The facts of this case distinguish it from the case at bar.

It is also contended that, to compel the company to accept a five-cent fare over its present line, would violate the right secured by the company under its contract, thus bringing the case within the contract clause of the Federal constitution. Upon this point appellant cites *Minneapolis v. Minneapolis St. R. Co.*, 215 U. S. 417. In that case the city undertook to compel the company to sell six tickets for twenty-five cents, whereas, the franchise granted a right to charge a five-cent fare. The court properly held that the right to

charge the fare provided in the franchise was of the essence of the contract, and that it could not be abridged by the city. No question of extension of city limits was involved, hence we conclude that the case is not here controlling.

This case depends upon the contract settling disputes, and the legal effect of the words:

"On and after the first day of April, 1903, the said party of the first part shall transport any person from any point or place within the corporate limits of the city of Tacoma, on any line or lines of street railway owned, operated or controlled by said party of the first part, to the terminus of its line in Point Defiance Park, for a single fare not exceeding five cents."

Some point is made by respondent of contemporaneous construction, or acquiescence in the contract as construed by the city. Being satisfied that the contract is broad enough to cover the position of the city, we shall not pursue this contention, except to say that, were we doubtful as to the law, it might be invoked to aid an interpretation of the contract.

It is strenuously contended that the construction we have put upon the contract would work an unwarranted hardship on the railway company, if, for instance, the boundaries of the city were so extended as to meet the boundaries of the city of Seattle. That is a condition that is not before us. We can only assume that, before the railway company extends its line to an unreasonable distance from the business centers of the city, it will enter into a contract with reference thereto, and take a franchise under such terms as may be satisfactory to it. Here we have an existing track over which cars have been and are being run without interruption and as a part of the city system. A trip initiated in one city and ending in another could not be held to be within the terms of a city franchise. Such roads are held to be inter-urban, and subject to other regulations. Furthermore, we are of the opinion that the right of the county to control the operation of appellant's Fern Hill line died with annexation,

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and the right to operate must be held to be amenable to the will of the constituted authorities of the city of Tacoma.

The judgment of the lower court is affirmed.

RUDKIN, C. J., DUNBAR, CROW, and MORRIS, JJ., concur.

[No. 9024. Department Two. October 31, 1910.]

CHARLES H. ANDERSON, *Respondent*, v. PACIFIC NATIONAL LUMBER COMPANY, *Appellant*.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—VIOLATION OF FACTORY ACT. The defense of assumption of risks is not available to a master who has failed to comply with the statute requiring the guarding of machinery.

TRIAL—PROVINCE OF COURT—NONSUIT—CONTRIBUTORY NEGLIGENCE. An action for personal injuries cannot be taken from the jury on the ground of plaintiff's contributory negligence, unless the same appears so plainly that reasonable minds cannot differ as to the natural consequences of the acts proven.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—DANGEROUS ACTS—EVIDENCE—SUFFICIENCY. An oiler is not guilty of contributory negligence, as a matter of law, in attempting to turn up a grease cup on a shaft, in a narrow space dangerously near an unguarded saw, where he was acting as instructed, in the usual and ordinary method, which from the construction of the mill was the only way in which the shaft could be oiled, and the cup had been operated in that way almost hourly for two or three months without accident.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 10, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an oiler in a sawmill. Affirmed.

John P. Hartman and Hayden & Langhorne, for appellant.

Govnor Teats, Hugo Metzler, and Leo Teats, for respondent.

¹Reported in 111 Pac. 337.

DUNBAR, J.—The respondent brought suit against the appellant to recover damages for injuries alleged to have been sustained by him while working in defendant's mill as an oiler. The complaint alleges negligence on the part of the appellant by reason of its failure to guard a jump saw. Respondent had worked at appellant's mill as oiler a little over three days prior to the happening of the accident in question. Under the main floor of the mill and near the ceiling, was a line of shafting suspended from a beam in the ceiling by shaft hangers. On the lower end of the shaft hanger were grease cups, each with a diameter of two inches. By turning or tightening the cap on the cup, the grease is forced upward through a small hole and onto the shaft, which keeps the shaft oiled. The particular grease cup the top of which the respondent was attempting to turn at the time of the accident was on the lower end of a hanger which supported a rapidly revolving pulley, the outer edges of the grease cup being about one inch from the rim of this pulley. On the other side of the cup, and about three inches from the edge thereof, were the teeth of a circular steam jump saw, which when in operation made twelve hundred revolutions a minute. The jump saw was unguarded at the time the respondent met with the injury for which he brings action. The saw had been guarded, but the guard had been displaced some time before, the appellant, in the statement of the case, says two or three days previous to the accident; but the testimony of the respondent was to the effect that it was between two and three months, and the testimony offered by the appellant on this question was not at all positive, and did not purport to be. The respondent, while turning the cap of this grease cup, had his hand caught in the revolving saw, and received the injury of which he complains.

In order to reach this grease cup, the respondent stood on a beam about twelve inches wide, which was part of the framework supporting the mechanism of the steam jump saw. The respondent is a man of short stature, being five feet four or

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five inches in height. It is six feet three inches from the lower part of the grease cup to the surface of the beam opposite the one that respondent stood upon when he attempted to tighten the grease cup in question. From the beam on which plaintiff stood, standing in an upright position, it is something over twenty-two inches, measuring directly across to the rim of the grease cup. According to the testimony of the respondent, he had to stand on his tip toes, hold onto the spike in the framework above him, which was placed there for that purpose, lean across the space indicated above, and tighten with the fingers of the left hand the cap on the grease cup. His theory of the accident was that, in attempting to turn the cap, his hand must have touched the pulley and been thrown into the saw. Upon the close of respondent's testimony, motion was made for nonsuit, which was overruled. At the close of all the evidence, motion was made for a directed verdict, upon the ground that respondent, under all the evidence, was clearly guilty of contributory negligence, which motion was also overruled, the case submitted to the jury, verdict returned in the sum of \$2,500, judgment was entered, and appeal followed.

It is conceded by the appellant that the company stands convicted of not having the saw in question guarded when it might have been guarded. But the contention is that the respondent, in undertaking to turn this grease cap, under the circumstances as shown by his own testimony, was guilty of contributory negligence as a matter of law; that the situation was so palpably dangerous that it was venturesome and foolhardy to attempt the turning of this oil cap within the short space given between the roller and the saw. Under the rule announced in *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915, the respondent did not assume the risk. The object of the factory act was to place the assumption of risk on the manufacturer who did not comply with the requirements of the act. The only question for determination here is, was the respondent, in the exercise of his duties,

guilty of such acts as would justify the court in deciding that he was guilty of contributory negligence as a matter of law, leaving nothing for the determination of the jury. The rule was laid down many years ago by Mr. Cooley to the effect that, before an appellate court would be justified in taking a question of this kind from the jury, contributory negligence must appear so plainly that reasonable minds could not differ as to the natural effect or consequences of the acts proven; and this court has indorsed this rule and cited it with approval in many cases.

Applying this test to the testimony in this case, can it be said that the respondent was guilty of contributory negligence as a matter of law? We think not. The testimony shows that the saw was not guarded where it should have been guarded, and that the guard had been off between two and three months when the respondent was placed at the work of oiling. The respondent's testimony was to the effect that Mr. Nailor, the foreman, called Mr. Fresh, an experienced oiler, introduced respondent to him, and told Fresh in respondent's presence to show him around and instruct him as to his duties. Mr. Fresh did take him around the mill, and explained to him where and how to oil the machinery. Mr. Fresh also testifies to the same effect, that he showed this particular oiling place to the respondent, that he stood on the twelve-inch timber, with his right hand catching onto the timber above, reached forward with his left hand, and demonstrated to the respondent how the cap should be moved, instructing him to be careful in the exercise of the work, and also that he must move this cap very frequently in order to keep the shaft from becoming dry. It also appeared from the testimony of Mr. Fresh that this was the only way in which this shaft could be oiled.

It must be remembered that the oil was not placed in this cup from this particular point, but that the turning of the cap threw the oil up onto the shaft. So it would seem that a man's whole hand would not necessarily be occupied in the

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turning of this cap. It could be done evidently by catching the cap between the points of his thumb and fingers; and while the testimony showed that it was a more or less dangerous duty to perform, and that without exercising care the operator's hand was liable to be thrown onto the saw, it also showed that it was the usual and ordinary method of turning the cap; that it had evidently not been regarded by the owners of the mill as so essentially dangerous that it was not practicable to operate it in that way, or they would not have so constructed it, leaving no other way for the greasing of the shaft. It appears also that it had been operated in that way by different persons for two or three months, almost hourly, without accident occurring to the operator. Inasmuch as the owners and designers of the machinery had evidently not regarded it as necessarily dangerous when due caution was taken in operating it, and that they had hired this man to operate it knowing its structural condition, it could scarcely be said, we think, with justice, that reasonable minds did not differ on the subject of whether its operation was a manifestation of contributory negligence as a matter of law. It would be a hard rule to permit manufacturers to construct machines so that they had to be operated in a particular way, hire men to operate them, instruct them in the mode of operating them, thereby to a certain extent at least recommending their safety when operated with care, and then hold that the very fact that the employee undertook to operate the machinery as directed and in the only way that it could be operated, was conclusive proof of contributory negligence on the part of the employee. We think the court committed no error in refusing the motions for nonsuit and for a directed verdict.

It is also assigned that the court erred in denying the motion for a new trial on the ground that the verdict returned by the jury was excessive. But a reading of the record satisfies us that we would not be justified in interfering with

the judgment rendered. The judgment will therefore be affirmed.

RUDKIN, C. J., CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 9218. Department One. November 1, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Charles E. McAvoy, Plaintiff, v. MITCHELL GILLIAM, Judge of the Superior Court et al., Respondents.*¹

ELECTIONS—CONTESTS—CITATIONS—TIME FOR—JURISDICTION. Where a primary election contest was filed within five days as required by Rem. & Bal. Code, § 4829, the statute prescribing no time for service of citation, the court has jurisdiction, after quashing a citation, to issue another citation.

ELECTIONS—CONTESTS—PROCEDURE—STATUTES. Rem. & Bal. Code, § 4829, authorizes any candidate for nomination at a primary election to contest the nomination of any other candidate for the same office, and provides a tribunal to try the question; and the fixing of the specific procedure is not essential to the validity of the statute, in view of Rem. & Bal. Code, § 69, providing that, when jurisdiction is conferred upon any tribunal, all the means to carry it into effect are also given, and if the proceedings be not specifically fixed, any suitable mode may be adopted.

LEGISLATURE—ELECTIONS OF MEMBERS—CONTESTS AS TO NOMINATIONS. Const., art. 2, § 8, providing that each house of the legislature shall be the final judge of the election of its members, does not prevent a judicial contest over the nomination of candidates.

Application filed in the supreme court October 31, 1910, for a writ of prohibition to the superior court of King county, Gilliam, J., to prevent a trial upon the merits of a petition and affidavit seeking to contest the nomination of relator for state senator. Writ denied.

J. L. Corrigan and Frank M. Egan, for relator.

F. J. Carver and L. E. Kirkpatrick, for respondents.

¹Reported in 111 Pac. 401.

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Opinion Per MOUNT, J.

MOUNT, J.—This is an application for a writ of prohibition. It appears that the relator and John A. Whalley were rival candidates at the primary election held in September last, for the office of state senator in the thirty-sixth senatorial district; that at such primary election the returns showed that relator received 1,491 votes, and Mr. Whalley received 1,485 votes; that on September 27, 1910, the canvassing board issued a certificate of nomination to relator, thereby authorizing his name to be placed upon the general election ballot as the republican nominee for such office. Thereafter Mr. Whalley, within five days, filed in the superior court of King county a petition or affidavit, seeking to contest the nomination of relator. This petition alleged misconduct of the clerks and judges of certain election precincts in the district, and also alleged illegal voting permitted by such judges, and fraud sufficient to avoid the nomination of the relator if the allegations contained in the affidavit are true. Thereafter a citation was issued and served upon relator. This citation was quashed upon motion of the relator, and thereafter another citation was issued and served requiring the relator to appear on October 27, 1910, and answer the contest and abide by any order the court might make. A motion to quash this citation was denied. Whereupon relator filed a demurrer to the affidavit and petition upon the ground that the court had no jurisdiction of the person or the subject-matter of the action. This demurrer was overruled, and the superior court of King county, in which the senatorial district is located, is threatening to try the petition and affidavit upon the merits. The relator seeks to prohibit the superior court from proceeding further, upon the ground that such court has no jurisdiction either of the person or of the subject-matter.

It is argued that the last citation is of no effect, because the court lost jurisdiction when the first citation was quashed. The statute provides, "that such affidavit may be presented within five days after the completion of the canvass by said

canvassing board, and not later." Rem. & Bal. Code, § 4829. There is no provision that the citation shall be served within that time. In *Thomas v. Van Zandt*, 56 Wash. 595, 106 Pac. 141, we held that where no time was fixed by statute when the notice should be served, a futile attempt to serve the citation for an appearance upon a day fixed by the court did not deprive the court of jurisdiction. This rule is conclusive on the question.

It is further argued that the court is without jurisdiction over the subject-matter, because there is no provision of the statute fixing a procedure in such cases. The statute provides, at § 4829, Rem. & Bal. Code:

"Any candidate at such primary election who may desire to contest the nomination of any candidate for the same office at said primary election may proceed by such affidavit so presented [that is, by affidavit to any judge of the supreme court or any judge of the superior court of the county]; Provided, that such affidavit may be presented within five days after the completion of the canvass by said canvassing board, and not later, and the candidate whose nomination is so contested shall, by order of such judge, duly served, be required to appear and abide by the orders of the court to be made therein."

This section, we think, clearly gives the right to *any candidate* for nomination at a primary election to contest the nomination of any other candidate for the same office. It does not limit such contests to certain officers, as is the case of a contest for an election, and therefore the rule announced in *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757, and *State ex rel. Fawcett v. Superior Court*, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674, does not apply in this case. This statute provides for a tribunal to try such question, and the process by which the contestant and the contestee are brought within the jurisdiction of the tribunal. It is true, no further specific procedure is pointed out by the statute, but § 69, Rem. & Bal. Code, which is a general provision relating to courts, provides:

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Statement of Case.

"When jurisdiction is, by the constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted, which may appear most conformable to the spirit of this code."

This section seems to supply any deficiency of procedure which is omitted in the primary law, and we think completely answers the objections named. It has been applied in similar cases. See, *Moore v. Gilmore*, 16 Wash. 123, 47 Pac. 239, 58 Am. St. 20; *Hays v. Merchants' Bank of Port Townsend*, 10 Wash. 573, 39 Pac. 98. Under the constitution each house of the legislature shall be the final judge of the election returns and qualifications of its own members. Const., art. 2, § 8. But this does not prevent the legislature from providing a method of nominating and electing candidates for office.

We are therefore of the opinion that the court has jurisdiction both of the subject-matter and of the person of the relator. The writ must therefore be denied.

PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 8888. Department One. November 10, 1910.]

L. S. BOYLAN, *Appellant*, v. ABBY BOCK *et al.*, *Respondents*.¹

JUDGMENT—RES JUDICATA—BAR—VACATION OF JUDGMENT. The denial of a motion to vacate a tax judgment, entered in the court below on the ground that the moving party had adopted the wrong procedure, but affirmed in the supreme court upon the merits of the application, is *res judicata* and bars a subsequent suit in equity to set aside the tax judgment and tax deed on the same grounds.

Appeal from a judgment of the superior court for King county, Shackleford, J., entered September 24, 1909, in favor of the defendants, upon granting a nonsuit, dismissing an action to vacate a tax judgment and deed. Affirmed.

¹Reported in 111 Pac. 454.

W. G. Woods and Edward Judd, for appellant.

Byers & Byers, for respondents.

RUDKIN, C. J.—On the 31st day of July, 1901, judgment was entered in the court below in a tax proceeding entitled *Abby Bock v. Barbara Sanders and C. Paul Sanders*, foreclosing a delinquency certificate, and directing a sale of the property therein described. On the 5th day of November, 1906, the plaintiff in this action interposed a motion to vacate the tax judgment, in the name and on behalf of the defendants therein, on the ground and for the reason that no notice or summons was served on the defendants, and that the court was without jurisdiction to render or enter the tax judgment. This motion was denied on the 24th day of November, 1906, for the reason that “the defendants should have appeared by petition and not by motion.” An appeal was prosecuted from the latter order to this court, where the judgment was affirmed. *Bock v. Sanders*, 46 Wash. 462, 90 Pac. 597. The affirmance was on the merits, however, and not upon the particular ground on which the order was based in the court below. Thereafter the present suit was instituted in equity to set aside and vacate the tax judgment and tax deed on the same grounds. The order denying the motion to vacate the judgment was pleaded in bar of the action, and from a judgment sustaining the plea of *res adjudicata*, the present appeal is prosecuted.

A person against whom a judgment is taken without jurisdiction may move against the judgment, or may prosecute an independent action to procure its vacation, but the two remedies are concurrent, and an adverse judgment in one proceeding is a bar to an action for similar relief under a different name or in a different form. This question has so often been decided by this court that it is no longer an open one. *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. 955; *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748; *Pierce County v. Bunch*, 49 Wash. 599, 96 Pac. 164; *Bunch v.*

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Pierce County, 58 Wash. 298, 101 Pac. 874; *Meisenheimer v. Meisenheimer*, 55 Wash. 92, 104 Pac. 159, 188 Am. St. 1005; *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119; *Newell v. Young*, 59 Wash. 286, 109 Pac. 801.

The appellant contends, however, that the former judgment was not on the merits for two reasons, and was therefore not a bar. First, because the motion to vacate was denied on the ground that the moving party had adopted the wrong procedure; and second, because the motion to vacate was based on the face of the record, whereas the present action was based on matters *de hors* the record. Conceding, for the purpose of argument, that these distinctions are sound, they are not supported by the record. While the court below denied the first motion on the ground stated, this court passed on the merits of the application regardless of the form of the action or proceeding, and an examination of the record in the two cases shows that the motion and accompanying affidavit filed on the first application set forth the identical grounds for vacating the judgment which are set forth as the basis for relief in the present complaint. Such being the case, the former judgment, whether right or wrong, is a complete bar to this action. The judgment is therefore affirmed.

MOUNT, GOSE, FULLERTON, and PARKER, JJ., concur.

[No. 8909. Department One. November 10, 1910.]

PETER DENNY, *Respondent*, v. SEATTLE, RENTON &
SOUTHERN RAILWAY COMPANY, *Appellant*.¹

STREET RAILROADS—COLLISION WITH VEHICLE—NEGLIGENCE—EXCESSIVE SPEED. In an action for injuries sustained in a collision of a street car with a vehicle, a nonsuit is properly denied, where there was evidence that the car was running thirty-five or forty miles an hour on a public street.

STREET RAILROADS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for injuries sustained in a collision of a street car and plaintiff's wagon, the plaintiff is not guilty of contributory negligence, as a matter of law, where, before crossing the track, he looked back and saw a car approaching about two blocks away, and assumed that he had time to cross, but before he could do so the rear wheel was struck by the car running at the rate of thirty-five or forty miles per hour.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$6,552.62 for the fracture of the skull and serious permanent injury to an able-bodied young man in the vigor of youth is not excessive.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 11, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by the driver of a wagon through collision with a street car. Affirmed.

Morris B. Sachs, for appellant.

Roberts, Battle, Hulbert & Tennant, for respondent.

RUDKIN, C. J.—The defendant railway company owns and operates a line of street railway on Rainier avenue, in the city of Seattle. On the 10th day of May, 1909, the plaintiff drove his team along the easterly side of this avenue to its intersection with Dearborn street, at which point he turned into the latter street and proceeded to cross the tracks

¹Reported in 111 Pac. 450.

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upon which the defendant company operates its cars. Before doing so, however, he looked in both directions and saw one of the defendant's cars approaching at a distance of about two blocks to the north, and thinking that he would have ample time to cross the tracks before the car reached him, he proceeded on his way. As the team passed over the rails and while his wagon was about midway of the track upon which the car was approaching, the plaintiff observed the car coming towards him at a very high rate of speed, about 100 feet distant from him. He endeavored to get clear of the track before the car struck him, but failed. The car struck the hind wheel of the wagon, throwing the plaintiff to the street, causing a fracture of the skull and other injuries for which a recovery was here sought. A judgment in the sum of \$6,552.62 was entered on a verdict in favor of the plaintiff, from which the defendant has appealed.

The appellant first assigns error in the denial of a motion for nonsuit, interposed at the close of the respondent's testimony, but this assignment is wholly without merit. There was ample testimony from which the jury might find that the car was running at the rate of thirty-five or forty miles per hour on a public street at the time of the injury, and that the motorman in charge of the car was guilty of gross and inexcusable negligence. On the other hand, we find nothing in the record upon which to predicate a charge of contributory negligence. There is certainly nothing to sustain such a charge as a matter of law. Error is assigned in the refusal of the court to give certain instructions requested by the appellant, but, waiving the objection that these refusals were not properly excepted to, there was no error in the rulings complained of. The several requests imposed entirely too high a degree of care on a traveler about to cross a street railway in a city. The denial of a motion for a new trial is assigned as error, chiefly on the ground that the verdict is excessive. The respondent, an able-bodied young man in the vigor of youth, was seriously and permanently in-

jured, and the verdict is well within the testimony. The judgment is therefore affirmed.

MOUNT, GOSE, FULLERTON, and PARKER, JJ., concur.

[No. 9005. Department One. November 10, 1910.]

DOTY LUMBER & SHINGLE COMPANY *et al.*, *Appellants*, v.
LEWIS COUNTY *et al.*, *Respondents*.¹

TAXATION—ASSESSMENT—REVIEW. The action of the board of equalization in raising an assessment on timber that has been cruised, on notice to owners given, cannot be reversed or set aside where the board did not act fraudulently or arbitrarily, but in good faith considered the distance of the property from railroads or logging streams, the contour of the land, and quality of the timber.

TAXATION—ASSESSMENT—LOWER RATE ON OTHER PROPERTY. The assessment of the property of others at a lower rate than that of a complaining taxpayer, whose property is not assessed beyond its cash value, does not invalidate the tax.

TAXATION—ASSESSMENT—OMISSION OF PROPERTY—MISTAKE OF LAW. The failure of the assessor to assess money, on the erroneous advice of the attorney general who was mistaken as to the law, does not affect the validity of a tax upon other property.

TAXATION—ASSESSMENT—EQUALIZATION—OMISSION OF PROPERTY. The failure of the board of equalization to raise the assessment on timber uncruised or where no notice could be given to the owners, does not prevent a raise on cruised timber on notice to the owners and a hearing.

Appeal from judgments of the superior court for Lewis county, Rice, J., entered December 10, 1909, in favor of the defendants, after a hearing on the merits before the court without a jury, dismissing actions to enjoin the collection of taxes. Affirmed.

Forney & Ponder, for appellants.

J. R. Burton and *J. E. Frost*, for respondents.

¹Reported in 111 Pac. 562.

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Opinion Per Gose, J.

Gose, J.—These are consolidated causes, tendering certain sums as taxes, and seeking injunctive relief as to all taxes in excess of the sums tendered. The charge in each of the bills is that the board of equalization, in pursuance of a fraudulent scheme on the part of the county commissioners, raised the assessment against the timber lands of the several plaintiffs. After issue joined and a full hearing on the merits, the court found that the charge of fraud had no foundation in fact or law, and dismissed the bills. The plaintiffs have appealed.

It appears from the record that in April, 1907, the board of commissioners, being of the opinion that the timber lands of the county were not bearing their just proportion of the burdens of government, appointed a head timber cruiser with authority to appoint "cruisers sufficient in number to complete the cruise of the timber lands in the county at as early a date as to him [the head cruiser] may seem practicable." In obedience to his directions, he employed and kept in the field from eight to twenty-three cruisers from that time until the meeting of the board of equalization in August, following. When the board of equalization met in August, 1907, about one-third of the timber lands of the county had been cruised, and notice of intention to raise the assessments had been mailed to the owners of such land. The board proceeded to equalize the assessment upon all the cruised lands where it had been able to serve notice upon the owner. Upon the land not cruised and upon the cruised land, where it had not been able to serve notice, it took no action. The commissioners, before the meeting of the board of equalization, tentatively established as bases of value seventy-five cents per thousand feet on all first-class timber within four miles of a commercial railroad, fifty cents per thousand feet beyond the four miles and within the limits of ten miles of such road, and twenty-five cents per thousand feet beyond the limits of ten miles, with proper deductions for timber of a lower class. The appellants had a hearing before the board of equalization.

In raising the assessment upon the timber lands of the several appellants after the hearing, the tentative bases were not strictly adhered to, but the board took into consideration the distance of the property from a logging stream or a commercial railroad, and the contour of the land as affecting the expense of getting the timber to market. In short, it fixed values on the basis of the quality of the timber and its accessibility to market. The timber, including the land upon which it stood, was equalized at from one-fourth to one-third of its value. Farming land and town property were assessed at about one-fourth of their value, and no change was made respecting their assessment by the board of equalization. Acting upon the advice of the attorney general of the state, money was not assessed. The detail sheets returned by the cruisers show the distance the land lies from the nearest railroad and logging stream respectively, the grade and kind of timber, and the character and contour of the land.

The appellants contend that the tentative bases of value were arbitrary and capricious; that their land is assessed at its full value; that other land in the county is assessed at not to exceed one-fourth of its value; that money was not assessed at all; and that the resultant acts of the board of equalization are fraudulent and void as to the taxes in excess of the assessment returned by the assessor. These several positions are variously stated and argued in the briefs, but we do not think the record bears out the charge that the board acted either arbitrarily or fraudulently. On the other hand, the evidence is convincing that the appellants had a full and fair hearing before the board of equalization, and that it and the commissioners acted in the utmost good faith. It is said, however, that the board acted on a fundamentally wrong principle in establishing the limits of four and ten miles as bases of value, and that the resultant acts are therefore void. *Hersey v. Board of Supervisors of Baron County,*

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37 Wis. 75, is cited as supporting the contention. In that case a fixed value was put upon standing timber within the limits established, without reference to logging conditions, the quality of the timber, or the character of the soil. There is a marked divergence in the opinions of the respective witnesses as to the value of the timber land, but the law put the burden upon the appellants, and the trial court who saw and heard the witnesses concluded that they failed to meet the burden, and we are inclined to take the same view. The board of equalization is the tribunal created by law to determine and equalize the values of property, and it is only when it acts arbitrarily or fraudulently that courts of equity will control its action. *Edison Elec. Ill. Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 132; *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553; *Union Pac. R. Co. v. Pierce County*, 55 Wash. 108, 104 Pac. 178.

Laws of 1907, pages 239, 240, 241 (Rem. & Bal. Code, § 9200), provides that the county commissioners, the county assessor, and the county treasurer, or a majority of them, shall form a board of equalization; that they shall meet annually on the first Monday in August of each year, examine and compare the returns of the assessment of the property of the county, and proceed to equalize the same so that each tract of real property shall be assessed at "its true and fair value," and that after giving at least five days' written notice to the owner or agent of the property, they shall raise the valuation of each tract of real property which in their opinion is returned below its true and fair value, to such price or sum as they believe to be "the true and fair value thereof." A like provision is made for personal property.

The assessment of the property of others at a lower proportion of its value than that of a complaining taxpayer, which is not assessed at more than its fair cash value as required by law, does not make the tax invalid unless the assessment was fraudulently made. *Keokuk & Hamilton*

Bridge Co. v. People, 161 Ill. 514, 44 N. E. 206; *Engelke v. Schlenker*, 75 Tex. 559, 12 S. W. 999; *Albuquerque Bank v. Perea*, 147 U. S. 87; *Mercantile Nat. Bank v. New York*, 172 N. Y. 35, 64 N. E. 756; *State v. Cudahy Packing Co.*, 103 Minn. 419, 115 N. W. 645, 1039; *Chicago B. & Q. R. Co. v. Babcock*, 204 U. S. 589; *Coulter v. Louisville & N. R. Co.*, 196 U. S. 599.

In *Keokuk & Hamilton Bridge Co. v. People*, the court said that the complainant's property was assessed at one-half its fair cash value, whilst the evidence showed that other property in the township was assessed at one-third its fair cash value. The court recognized the principle that the overvaluation may be so excessive and made under such circumstances as to create the presumption of fraud, but concluded upon the facts that there was neither actual nor constructive fraud shown, and refused to grant relief. In the *Albuquerque Bank* case it was held that the fact that the plaintiff's property was assessed at eighty-five per cent of its full value, whilst other property was assessed at seventy per cent of its value, was not ground for equitable interference. The court said:

"The law of New Mexico requires property to be assessed at its cash value. Confessedly, this plaintiff's property was assessed at fifteen per cent below that value. Surely, upon the mere fact that other property happened to be assessed at thirty per cent below the value, when this did not come from any design or systematic effort on the part of the county officials, and when the plaintiff has had a hearing as to the correct valuation, on appeal before the board of equalization, the proper tribunal for review, it cannot be that it can come into a court of equity for an injunction."

The board had before it satisfactory evidence of the value, quality, and quantity of timber upon each piece of land, the character and contour of the land itself, the distance of the timber from logging streams and commercial railroads, and the general logging conditions, and from this evidence, sup-

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plemented by the knowledge of its members who were under oath to do their duty, it acted as it saw the light; and even if it be conceded that it made mistakes, they were honest mistakes, and afford no ground for interfering with its judgment.

At the trial it was stipulated that about two million dollars on deposit in the banks was not assessed in 1907. The appellants contend that the failure to assess it invalidates the assessment. As we have said, the assessor was advised by the attorney general of the state that money was exempt from taxation under Laws 1907, pages 67, 70. This statute has since been construed to be unconstitutional in so far as it attempts to exempt money from taxation. *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 96 Pac. 1047. The omission of the assessor to assess property, under a misapprehension of the law, will not invalidate the assessment list. It is the same in legal effect as the casual omission of property through a mistake. *People v. McCreery*, 34 Cal. 432; *Dunham v. Chicago*, 55 Ill. 357; *B. & M. R. Co. v. Seward County*, 10 Neb. 211, 4 N. W. 1016; *Auditor General v. Sage Land & Imp. Co.*, 129 Mich. 182, 88 N. W. 468, 56 L. R. A. 105. Discussing this question in *Weeks v. Milwaukee*, 10 Wis. *242, 264, the court aptly observes:

"The execution of these laws is necessarily entrusted to men, and men fallible, liable to frequent mistakes of fact and errors of judgment. If such errors on the part of those who are attempting in good faith to perform their duties should vitiate the whole tax, no tax could ever be collected. And therefore, though they sometimes increase improperly the burdens of those paying taxes, that part of the rule which holds the tax not thereby avoided, is absolutely essential to a continuation of government."

The same principle applies to the uncruised land. It is obvious that any action upon the part of the board without information upon the facts would have been arbitrary and capricious, and it is equally apparent that any action by the

board raising the assessment upon the cruised lands, where it had not been able to get notice to the owners, would have been a nullity.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, PARKER, and MOUNT, JJ.,
concur.

[No. 9141. Department One. November 10, 1910.]

THE CITY OF ABERDEEN *et al.*, Respondents, v. R. A. WILEY
et al., Appellants.¹

REFORMATION OF INSTRUMENTS—MISTAKE—RIGHT OF GRANTEES—ESTOPPEL—HIGHWAYS—PUBLIC LANDS—STATE DEED. In an action to reform a state deed for mistake in including a state aid road, established and partly built upon state tide lands, upland owners who subsequently applied to purchase the tide lands cannot take advantage, nor claim ignorance, of a mistake of the commissioner of public lands in executing the deed for the tide lands before receiving a waiver from the grantees as to the strip of land upon which the road was being built, such waiver having been demanded of them.

SAME—DEFENSES—ESTOPPEL—CONSTITUTIONALITY OF LAW—PUBLIC LANDS—TIDE LANDS—PREFERENCE RIGHT TO PURCHASE. The purchaser of state tide lands, applying for the same after a state aid road was established and partly constructed across the lands, cannot assert the unconstitutionality of the law establishing the state aid road and authorizing its construction, in an action to reform the state deed so as to except the road from the deed; the preference right to purchase not being a vested right, but a mere gratuity.

SAME—DEFENSES—DOCTRINE OF STATUS QUO. In an action to reform a state deed of tide lands by excepting a state aid road through the property, the doctrine of *status quo* has no application where the grantees knew, at the time the deed was given and the purchase price paid, that the state did not intend to include the roadway in the conveyance.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered August 6, 1910, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to reform a deed. Modified.

¹Reported in 111 Pac. 457.

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Opinion Per Gose, J.

*Conway & Snider and J. B. Bridges, for appellants.**The Attorney General and John C. Hogan, for respondents.*

Gose, J.—The purpose of this action is to reform a deed, heretofore executed and delivered by the state to the defendants, conveying to them certain tide lands in the city of Aberdeen. The court entered a decree vacating the deed as an entirety. The defendants have appealed.

The respondents seek to reform the deed, so as to except and reserve to the state a strip of land forty feet in width lying along the banks of the Chehalis river, a tidal, navigable stream. In 1905, a law was enacted providing for building a state road in Jefferson, Clallam, and Chehalis counties, beginning at the city of Montesano, running westerly to Aberdeen, thence to Port Angeles, and appropriating \$13,500 therefor, the same being designated as state road No. 9, Laws 1905, pages 18 to 22. In 1907, an additional sum of \$30,000 was appropriated for the construction of the road. Laws 1907, pages 308 to 312. On January 4, 1907, the maps and profile of the road through Chehalis county were submitted to the highway board, and the road as surveyed through that county was declared feasible in accordance with the provisions of §4, Laws 1905, p. 356. On February 6, 1907, the state and the county of Chehalis entered into a contract with a construction company for the construction of a trestle road over the strip of land sought to be reserved, being a part of state road No. 9. The contract was completed about May 11 following. The contract provided that the state should pay \$4,500, and the county of Chehalis \$2,250, and that the city of Aberdeen should pay the remainder of the contract price. On April 16, 1907, the appellants, being the owners of the abutting uplands, filed in the office of the commissioner of public lands their application to purchase tide land lots 3 and 5, of tract 9, of the Aberdeen tide lands, of which the roadway in question is a part. On November 5, 1908, the

state conveyed these lots to the appellants, without reservation, for a consideration of \$105.

The state contends that, through inadvertence, it failed to reserve the roadway. This contention has abundant support in the evidence. It appears that, while the application was pending, the state board of land commissioners refused to convey the land to the appellants until they filed a waiver as to the strip of land in controversy. The appellants thereupon submitted a waiver which the officers of the state turned back to them for correction. Before certifying to the governor the facts upon which the deed was issued, the land commissioner was advised by the highway commissioner that the waiver was on file in his office. Relying upon this information, the deed was executed.

The appellants contend that they only agreed to the waiver on condition that the state would forthwith execute the deed, and not require them to contest with the Northern Pacific Railway Company their preference right to purchase, and that if there was a mistake it was due to the negligence of the state's officers, and that the mistake was not mutual. The undisputed facts, however, are so cogent as to leave little force to this contention. It is not disputed that, at the time they filed their application to purchase, large sums of money had been expended upon the road, and that it was practically completed across the tide lots. The appellants certainly knew that the state did not intend to convey a roadway to them upon which it and the county and the city of Aberdeen had expended large sums of money. They knew that its good faith was pledged by the laws of the state and by the acts of the highway commissioner to the municipalities which had joined it in the enterprise. They cannot shut their eyes to the physical facts which were known to them, and now be heard to assert that they were ignorant of the state's mistake. They paid a mere trifle for the property.

The appellants further assert that the laws to which we

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have referred are invalid in several respects as applied to the road in controversy, and that the road has never been legally established. We will not consider these contentions. The road was actually surveyed, constructed, and paid for long prior to the execution of the deed. In *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988, we said that the preference right given to the upland owner to purchase tide lands was not a right of property but "a mere gratuity." In *State ex rel. Wilson v. Grays Harbor & Puget Sound R. Co.*, ante p. 32, 110 Pac. 676, we held that the preference right to purchase tide lands is not a vested right as against the state, prior to actual purchase.

It is also contended that the superior court had no jurisdiction to review the decision of the board of state land commissioners; that the board acted judicially, and that it alone has power to correct the error. This view is untenable. *State v. Heuston*, 56 Wash. 268, 105 Pac. 474.

The doctrine of *status quo* has no application to the case. The appellants knew, when they took the deed and paid the purchase price, that the state only intended to convey to them so much of the tide lots as was not within the roadway.

The view we have taken of the case renders it unnecessary to consider other points pressed by the appellants. Their contentions are all technical. The state was dealing with its own property, and it could sell or withhold such part of it as it deemed expedient. The decree will be modified, with directions to the lower court to enter a decree reforming the deed so as to except the strip of land described in the third paragraph of the complaint and quieting title to the same. Neither party will recover costs.

RUDKIN, C. J., FULLERTON, PARKER, and MOUNT, JJ.,
concur.

[No. 8755. Department One. November 11, 1910.]

OSCAR LAHTI, *Appellant*, v. HENRY ROTHSCHILD *et al.*,
Respondents.¹

MASTER AND SERVANT—NEGLIGENCE—APPLIANCE—EVIDENCE—SUFFICIENCY. It is actionable negligence to use a large link chain for holding a sling load of small dimension lumber, in lowering the same into the hold of a ship, whereby some of the pieces slipped from the load and fell upon a stevedore, where it appears that it was suitable only for large timbers, and it was customary to use a small chain, one witness testifying that difficulty was encountered in its use and complaint made to the foreman.

MASTER AND SERVANT—ASSUMPTION OF RISKS—COMPREHENSION OF DANGER. In such a case, an injured stevedore of long experience did not assume the risk, as a matter of law, where he testified that he had never had any experience with a chain of that size in handling small dimension lumber and did not know that it would not hold the pieces securely, and he had worked five or six days with the chain in question without any occurrence that would suggest the danger of pieces slipping from the load.

Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered November 27, 1909, in favor of the defendants, upon withdrawing the case from the consideration of the jury, dismissing an action for personal injuries sustained by a stevedore in loading a ship. *Reversed*.

Dan Pearsall and *A. Emerson Cross*, for appellant.

J. B. Bridges, *Theo. B. Bruener*, and *John P. Hartman*, for respondents.

PARKER, J.—This action was commenced by the plaintiff to recover damages for personal injuries which he alleges resulted to him from the negligence of the defendants. The cause proceeded to trial before the court and a jury, when, at the close of the evidence produced in behalf of the plaintiff, upon motion of defendants' attorneys, the court took the case from the consideration of the jury and entered a judgment in defendants'

¹Reported in 111 Pac. 451.

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favor, deciding, as a matter of law, that the defendants were not guilty of negligence resulting in plaintiff's injury, and that such injury was the result of his contributory negligence and risks assumed by him. From this disposition of the cause, the plaintiff has appealed.

The evidence produced by appellant shows, in substance, the following: Respondents are engaged in the stevedoring business at Aberdeen under the firm name of Rothschild & Company. On September 14, 1908, and for some days prior thereto, they were engaged in loading a ship with lumber at a wharf at Aberdeen. During this time, and prior thereto, the appellant was employed by them, and it was while so employed in the hold of the ship that he was injured. The loading was being carried on by hoisting the lumber from the wharf and lowering it into the hold of the ship with a hoisting engine, boom and tackle. The lumber being loaded at the time of the injury to appellant, and for five or six days prior thereto, consisted of pieces varying in lengths from ten to twenty-six feet, and also of the varying dimensions of 2x3, 2x4, 4x4, 2x6, and 1x12, and occasionally of 6x12. The lumber would be piled on the wharf so that one end of all the pieces would be even, in such quantity as to make a suitable load for hoisting and lowering into the hold. A chain, called a sling, would then be placed around the load nearer to the even end than the other, to which would be attached the cable or rope from the engine. The engine then being started raised the load, and when suspended it would hang in a slanting position with the even end higher than the other. This enabled the load to pass down through the hatch into the hold, the hatch being too small to otherwise admit the load. When the load was lowered into the hold and before it came to rest upon the floor or other lumber there, it was the duty of appellant to push it under the deck clear of the hatch, when it would be lowered upon the floor or other lumber, and then be stowed away. On September 14, 1908, while appellant was so employed, a load was lowered into the

hold, appellant standing clear of the hatch under the deck ready to receive it as usual. When the uneven end of the load had come to rest upon the floor he passed around the even end, which was then still suspended in the sling, and when he was about to start to push it under the deck, four pieces, ten or twelve feet long, slipped out of the top of the load, falling on appellant and causing the injury for which he claims damages. The chain used for the sling was composed of large links, about three inches wide and four inches long.

The evidence tends to show, and would warrant the conclusion, that the falling of the pieces from the sling was caused by the large links composing the chain, which prevented its being fastened around the load as tight as it could have been if composed of small links; that a small linked chain would have drawn tight around the load by the weight of the load, the hook on the end of the chain being hooked around the chain above the load, which hook would readily slip down upon a small chain, but not upon a large chain like this one; that while a large chain was suitable for handling large timbers, it was not suitable for handling pieces of this size; and that it was not the custom to use such a large link chain for this size pieces, but it was customary to use a small link chain for such pieces. One witness, working on the wharf, said they had difficulty in fastening the load with the chain, and made some objections to the boss about it. This was unknown to appellant. While appellant was a longshoreman of considerable experience, he testified that he never knew of the use of a large link chain like this one in loading lumber of this size, that he never had any experience in the use of a chain of this large size with small dimension lumber like this, and did not know that such a chain would not securely hold such lumber. Appellant saw this chain in use handling lumber of these dimensions for five or six days, during which time no serious consequence resulted from its use, so that he

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gained no knowledge of the dangers incident to its use during that time.

Learned counsel for appellant contend that the use of the large link chain for handling this lumber, and the evidence tending to show that it was not suitable for that purpose, was a sufficient showing of negligence on the part of respondents to call for the submission of that question to the jury. This contention we think is well founded, unless it can be held, as a matter of law, that appellant assumed the risk incident to the use of the chain because of his knowledge of such use and the danger thereof. It seems to us that a jury might well be justified in believing from this evidence that the risk incident to the use of this large link chain was extraordinary. That is, that it was a risk which could have been obviated by the exercise of reasonable care on the part of respondents. 1 Labatt, Master and Servant, § 270. Hence, its use might justify a finding of negligence against respondents, though it may be conceded that it would not be such negligence but that liability therefor could be obviated by appellant's assuming the risk. Now, can it be said, as a matter of law, upon this record, that appellant assumed this risk, supposing that the jury might conclude that the risk was extraordinary. This question must be answered in the light of the evidence touching appellant's knowledge of the use of the chain, and also his knowledge of the danger incident to its use. Of course, he knew of the use of the chain, but before he can be charged with assumption of the risk, it must appear that he comprehended the danger as well as knew of the physical conditions. Bailey, Master's Liability for Injuries to Servants, 184; Wood, Law of Master and Servant (2d ed.), § 376; *Shoemaker v. Bryant Lum. & Shingle Mfg. Co.*, 27 Wash. 637, 68 Pac. 380.

In 1 Labatt on Master and Servant, § 271, the rule is stated as follows:

"An extraordinary risk, it is said, is not assumed unless it is, or ought to be, known to and comprehended by the servant,

or—as the same conception may also be expressed in logically equivalent terms—where the servant is chargeable neither with an actual nor a constructive knowledge and comprehension of the risk.”

Learned counsel for respondents contend, in substance, that the evidence of appellant's experience as a longshoreman is sufficient to impute to him a comprehension of the dangers of using this large link chain, and that the trial court was justified in so determining as a matter of law. It is true that appellant appears to be a longshoreman of considerable experience. He tells us in his testimony, however, that he never had experience in the use of a chain of this size in handling pieces of these dimensions, and did not know that such chain would not securely hold a sling load of such pieces. We have seen that he worked there five or six days under these conditions without anything occurring that would suggest such danger to him. If he comprehended, or was bound to comprehend, such danger, it was only because of his general knowledge of, and experience in, the business. It seems to us the danger was not so apparent that it can be decided, as a matter of law, that a reasonable person in his position and with his knowledge and experience was bound to know and comprehend the risk incident to the use of this chain. We think reasonable minds might differ upon this question, and that it was therefore a question for the jury. We conclude that the learned trial court erred in taking the case from the jury at the close of appellant's evidence.

The judgment is reversed, with instructions to award appellant a new trial.

RUDKIN, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

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[No. 8881. Department One. November 11, 1910.]

EDGAR A. MAHER, *Appellant*, v. T. S. POTTER *et al.*,
Respondents.¹

TAXATION—TAX TITLES—MORTGAGEE—PURCHASE TO PREVENT REDEMPTION OF MORTGAGE. A mortgagee cannot acquire a tax title against the mortgaged property and hold the same against the mortgagor, except as a lien for the taxes paid, and one acquiring the tax title under a conspiracy with the mortgagee can acquire no greater right than could the mortgagee.

TAXATION—TITLE—ACTION TO SET ASIDE—LIMITATIONS—TRUSTS—PURCHASE IN INTEREST OF MORTGAGEE. The three years statute of limitations for actions to set aside a tax deed does not apply as to one acquiring the tax title pursuant to a conspiracy with a mortgagee of the premises, for the purpose of preventing a redemption from the mortgage; since such conspirator would hold the lands in trust for the mortgagor, and as security for the money paid for taxes.

GOSE, J., dissents.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered January 3, 1910, upon sustaining a demurrer to the complaint, dismissing an action to vacate a tax deed. Reversed.

Edgar A. Maher and *W. H. Abel*, for appellant.

Austin M. Wade, for respondents.

PARKER, J.—This is an action to set aside a tax deed issued by the county treasurer of Chehalis county upon foreclosure of a certificate of delinquency. Judgment was rendered in favor of the defendants, dismissing the action upon the plaintiff's electing to stand upon his complaint after the court had sustained a demurrer thereto. From this disposition of the cause, the plaintiff has appealed.

The complaint alleges facts which appellant contends show a number of defects in the foreclosure rendering the tax deed ineffectual to divest him of title. However, the following facts, shown by the allegation of the complaint, are all we

¹Reported in 111 Pac. 453.

need notice for the purpose of disposing of the present appeal. The appellant was the owner of the lots at the time of the foreclosure and issuance of the tax deed under which the respondents claim title. The tax foreclosure was based upon service by publication only; no summons being mailed to appellant, it being claimed that he was a nonresident of the state and that his residence was unknown. The respondent Potter was the plaintiff in the tax foreclosure, and also became the purchaser to whom the tax deed was issued. The other respondents are grantees of Potter. Among other facts alleged and relied upon to show that the tax deed did not divest appellant of title, are the following:

"That the amount paid for said certificate of delinquency was paid by or at the instance of one Margaret M. Parsons to whom the plaintiff herein had mortgaged said premises, or by some person or persons, or by or at the instance of some person or persons, to whom said Margaret M. Parsons had assigned or conveyed her interest in said real estate and premises described in said certificate of delinquency, or had made some contract, arrangement or had some understanding with, that the right or interest under said mortgage should be conveyed to the holder of said certificate of delinquency or to such person or persons as should succeed to the claim or title under the same, and that said certificate of delinquency was procured, and proceedings for the foreclosure of the apparent taxes lien thereunder were instituted and carried on and the deed of the county treasurer to said T. S. Potter was obtained, in pursuance of a conspiracy between the said Margaret M. Parsons and said T. S. Potter, the purpose of which was to defraud the plaintiff in this case and prevent him from redeeming from the lien of said mortgage and said delinquent taxes, and deprive the plaintiff herein of his title to said lands."

Tender of all sums due from appellant to respondents on account of taxes is alleged. The prayer is, in substance, that the tax deed to Potter and the conveyances from Potter under which the other respondents claim be set aside, and that appellant be permitted to redeem the lots by paying to respondents the sums due them on account of the taxes. The

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complaint was demurred to by respondents upon the ground that it did not state facts sufficient to constitute a cause of action, and that the action was not commenced within the time limited by law.

It seems to us that the relationship of mortgagee and mortgagor, and the conspiracy between the mortgagee and respondent Potter, alleged in the above-quoted portion of the complaint, brings this case within the rule announced by us in *Shepard v. Vincent*, 38 Wash. 493, 80 Pac. 777, to the effect that a mortgagee cannot acquire a tax title to the mortgaged premises, and hold the same against the mortgagor, except as a lien upon the premises for the taxes paid in acquiring such tax title. His lien is then of the same nature as that of his mortgage, and subject to foreclosure only in the same manner. The more recent cases of *Finch v. Noble*, 49 Wash. 578, 96 Pac. 3, and *Stone v. Marshall*, 52 Wash. 375, 100 Pac. 858, are in harmony with this doctrine. The allegation that respondent Potter acquired the tax deed in pursuance of a conspiracy with the mortgagee, if true, renders it plain he acquired no greater rights than the mortgagee would have acquired had she taken the tax deed in her own name. We are of the opinion that these facts constitute a cause of action for setting aside the deeds and permitting appellant to redeem.

Respondents contend that since this is an action to set aside a tax deed, it is barred by Rem. & Bal. Code, § 162, providing that such action must be brought within three years after the issuance of the deed; and rely upon *Anderson v. Spokane, Portland, etc. R. Co.*, 57 Wash. 439, 107 Pac. 183, and *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850. It may be conceded that if that statute is applicable to this case, it has run its course and would bar this action; but since we conclude that the tax deed was in effect acquired by a mortgagee against a mortgagor, the statute of limitation has no application. Even if we should proceed upon the theory that the tax deed vested the legal title in the grantee, Potter, such legal title would be held by him in trust for the

mortgagor, and held only as security for the money paid in satisfying the tax upon which it was based. We are of the opinion that, if the allegations of the complaint above quoted be true, the statute of limitations has no effect upon the rights of the parties to this action. We conclude that the court was in error in sustaining the demurrer to the complaint. The judgment is reversed, with directions to overrule the demurrer to the complaint.

RUDKIN, C. J., MOUNT, and FULLERTON, JJ., concur.
GOSE, J., dissents.

[No. 8994. Department One. November 11, 1910.]

CLAUDE LEITCH, *Respondent*, v. J. W. YOUNG, *Appellant*.
CLAUDE LEITCH, *Respondent*, v. E. E. BACON, *Appellant*.¹

EQUITY — ADVISORY VERDICT — CONCLUSIVENESS — INCONSISTENCY. Upon the submission of questions to a jury in an equitable case, the verdict is advisory only, and inconsistency between special findings and the general verdict is immaterial.

TRIAL—FINDINGS—NECESSITY. Specific findings are not necessary in an equity case.

APPEAL—REVIEW—FINDINGS. Findings will not be disturbed on appeal where the trial judge heard and saw the witnesses and the evidence is conflicting and fully supports the findings.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered April 2, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in consolidated actions to foreclose pledges of shares of corporate stock. Affirmed.

Boner & Boner, for appellants.

John C. Hogan, for respondent.

PARKER, J.—These suits were commenced to foreclose certain pledges of shares of the capital stock of the Leitch-

¹Reported in 111 Pac. 449.

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Walker Shingle Company, a corporation, which were pledged by defendants to the plaintiff and his associates to secure the payment of certain promissory notes. There is no controversy over the execution of the notes and pledges, and the defense in each case being based upon the same facts, the cases were consolidated by stipulation of all parties and tried together. By request of the defendants the trial was before the court and a jury, though it is conceded that the issues are of equitable cognizance. The result was a verdict and judgment in favor of the plaintiff, and the defendants have appealed.

On and prior to September 4, 1908, the Leitch-Walker Shingle Company was the owner of a shingle mill plant and stock on hand, near Tenino, in Thurston county, and a contract for the delivery to its mill of all the merchantable shingle bolts upon certain lands in that neighborhood. Its capital stock was 80 shares of the par value of \$100 per share. The respondent and his associates were the owners of 60 shares of this stock. On September 4, 1908, they sold their stock to appellants, 40 shares to Young and 20 shares to Bacon, who paid for the same one-half cash, and one-half by executing separately their promissory notes payable September 4, 1909, and secured the same by each pledging certain shares of the same stock. The respondent became sole owner of the notes by assignment, and these suits were commenced to foreclose the pledges soon after the notes became due.

The affirmative defenses present the only questions here involved, which are, in substance, that respondent and his associates made certain false representations as to the resources and liabilities of the company, inducing appellants to purchase the stock, to the effect that the company was worth several thousand dollars more than it in fact was worth, and that the excess of such represented worth over its true worth far exceeded the amount due upon the notes here involved. The respondent not being an innocent holder, there is presented simply the question of offsetting against the purchase

price of the stock the difference between its value measured by the true condition of the company and its value measured by the condition of the company as represented. At the time of the sale of the stock, respondent and his associates gave to appellants a statement of the resources and liabilities of the company, with a written guaranty that it was "practically correct." The only question upon this guaranty arises upon appellants' allegations of its incorrectness. It is also alleged that respondent and his associates represented that there would be 10,500 cords of bolts coming to the company under the contract, which would be sufficient to run the mill three years, when, in fact, there was upon the land covered by the contract only about one-half that amount.

The jury returned general verdicts for respondent for the amount due upon the notes less the sum of \$170, which it evidently deducted on account of incorrectness in the guaranteed statement of the company's resources and liabilities. The court adopted the findings of the jury as evidenced by its general verdicts, and rendered judgments accordingly. Certain interrogatories were submitted to, and answered by, the jury in the form of a special verdict. It is argued that these answers are inconsistent with the general verdicts; that neither are warranted by the evidence; that the evidence showed misrepresentations touching the worth of the company affecting the value of the stock more than the amounts due upon the notes; and that, therefore, the judgments should have been for appellants notwithstanding the verdicts. This is, in substance, the whole of appellants' contentions, and, of course, only involves questions of fact. This being on the equity side of the court, and the findings of the jury being merely advisory to the court, we will not concern ourselves with errors arising out of possible inconsistencies between the special and general verdicts. The submission of the issues of fact to the jury was wholly optional with the court. It could adopt the jury's findings or any of them, or could reject any or all of them. *Rathjens v. Merrill*, 38 Wash. 442, 80

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Pac. 754; *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490, Nor was it necessary to make any specific findings in a cause of this nature. *White Crest Canning Co. v. Sims*, 30 Wash. 374, 70 Pac. 1003; *Clambey v. Copland*, 52 Wash. 580, 100 Pac. 1031. So the question before use is the same as if the court had disposed of the cases upon its own conclusions upon the facts without making any specific findings other than as to the amounts due.

We have carefully read all of the several hundred pages of evidence bearing upon the alleged representations as to the company's resources and liabilities. It would not be practical, or serve any useful purpose, to review the evidence here touching the numerous items involved. We find a sharp conflict in the evidence concerning the amount of shinglebolts upon the land, and also concerning the alleged representation made relative thereto. The evidence relating to most of the other items involved is either uncertain or in conflict, and even the amount allowed appellants seems to have been made up of items at least some of which were allowed upon evidence not free from conflict. The learned trial court heard and saw all the witnesses. His opportunity for determining the facts was better than ours, and we think this record fully supports his conclusions.

The judgments are affirmed.

RUDKIN, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 8887. Department One. November 15, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. RICHARD
CROUCH, *Appellant*.¹

RAPE—CORROBORATION OF PROSECUTRIX—NECESSITY. Under Rem. & Bal. Code, § 2443, providing that no conviction of rape shall be had upon the testimony of the prosecutrix unless supported by other evidence, it is error to refuse to instruct the jury that no conviction can be had upon the uncorroborated testimony of the prosecutrix, when she was contradicted by other witnesses.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 16, 1909, upon a trial and conviction of rape. Reversed.

E. H. Howell, for appellant.

PER CURIAM.—The appellant was convicted of the crime of rape upon a female under the age of eighteen years. At the trial, counsel for the appellant requested the court to instruct the jury to the effect that no conviction could be had upon the uncorroborated testimony of the female alleged to have been raped. The trial court refused to so instruct the jury. This was error. The statute provides at § 2443, Rem. & Bal. Code: "No conviction shall be had . . . upon the testimony of the female upon or against whom the crime was committed, unless supported by other evidence." This means, of course, that there must be corroborative evidence. The case was one where the prosecuting witness was disputed by witnesses called by the state, and where the jury should have been informed by the court that a conviction could not be had upon her uncorroborated statements. The refusal of the court to so instruct was clearly prejudicial error.

The judgment must therefore be reversed, and the cause remanded for a new trial.

¹Reported in 111 Pac. 562.

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Opinion Per Curiam.

[No. 9018. Department Two. November 15, 1910.]

CHARLES T. PETERSON, *Appellant*, v. PUGET SOUND BISCUIT COMPANY *et al.*, *Respondents*.¹

PLEADING—COMPLAINT—SUFFICIENCY—NEGOTIABLE INSTRUMENTS—FRAUDULENT CONVEYANCES. A complaint against a corporation and its receiver fails to set forth any cause of action against the defendants, where it merely sets up a promissory note given by the promoter of the corporation in payment for machinery, and alleges that the corporation and the promoter were one and the same person, the incorporation of the former being illegal, and that the assets of the corporation were the assets of the promoter, who was undertaking to cheat and defraud the plaintiff; it not being alleged that the defendants owed the plaintiff anything or had attempted to defraud the plaintiff.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered May 21, 1910, dismissing an action, upon sustaining a demurrer to a complaint setting up promissory notes and alleging fraud. Affirmed.

Bates, Peer & Peterson, for appellant.

J. W. A. Nichols, for respondents.

PER CURIAM.—This appeal is from a judgment and order of court sustaining a demurrer to plaintiff's amended complaint, and rendering judgment thereon dismissing the same. The complaint embraces two causes of action on two promissory notes and, omitting the formal parts, alleges:

"(1) That J. W. A. Nichols is the duly appointed and qualified receiver of the Puget Sound Biscuit Company, having been appointed such on the — day of December, 1909, in a certain cause herein pending, entitled, 'William Herlan, plaintiff, vs. Puget Sound Biscuit Company, a corporation, defendant.'

"(2) That on the 16th day of April, A. D. 1909, one Joseph Gawley purchased certain machinery of the Inland Empire Biscuit Company, a corporation, at Spokane, Wash-

¹Reported in 111 Pac. 561.

ington, and gave therefor his promissory note to secure such purchase price, in words and figures as follows:

"\$1,921.55 Spokane, Washington, April 16, 1909.

"Six months after date, without grace, for value received, I promise to pay to the order of the Fidelity National Bank of Spokane, at their office in Spokane, Washington, nineteen hundred twenty-one and 55-100 dollars, with interest from date at the rate of six per cent per annum, until paid; and in case suit is instituted to collect this note, or any portion thereof, we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit.

"No. 10082, Due Oct. 16, 1909

Joseph Gawley,
"Peter Sandberg.

(Endorsement)

"Gawley Foundry & Machine Wks.

"By Joseph Gawley, Secy. & Treas.

"Inland Biscuit Company,

"By F. E. Krause, President.

"That in said transaction said Joseph Gawley was doing business in his individual name and under the firm name and style of Puget Sound Biscuit Company, and that said Joseph Gawley and Puget Sound Biscuit Company was one and the same person, that at the time of the purchase of said machinery and the making of said note, said Joseph Gawley was insolvent and for the purpose of defrauding plaintiff and his assignor, fraudulently and designedly pretended to have the sale of said machinery which was purchased and paid for wholly with said note transferred to himself under the name and style of Puget Sound Biscuit Company; that thereafter and in furtherance of said design and scheme to defraud plaintiff or his assignor, said Joseph Gawley pretended to do business as the Puget Sound Biscuit Company, a corporation, and made an ineffectual attempt to form a corporation under such name; that the pretended articles of incorporation thereof were never regularly filed, nor was the capital stock thereof regularly subscribed, nor a first meeting of the board of trustees thereof regularly had, and said pretended incorporation was not had in good faith nor participated in by said Joseph Gawley nor the other persons connected therewith in good faith, but was managed and manipulated by said Joseph Gawley for his sole use and benefit all in furtherance of his said scheme and design to cheat and defraud plaintiff and his assignor. That said Puget Sound Biscuit Company, a cor-

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poration, and Joseph Gawley, and the Puget Sound Biscuit Company were in fact one and the same person, and the assets and liabilities of said Joseph Gawley and of the said Puget Sound Biscuit Company and the said Puget Sound Biscuit Company, a corporation, were and are in fact wholly and solely assets and liabilities of Joseph Gawley."

The demurrer was to the effect that the complaint did not state facts sufficient to constitute a cause of action against the defendants. The appellant has not, either by oral argument or brief, favored this court with an argument in support of the complaint, and we have been unable to conceive of any that would be tenable. It is difficult to tell the character of the complaint. It certainly was not an action on the notes, for the defendants were in no way parties to the notes; neither are they parties in interest under the allegations of the complaint. If it was intended to set aside a fraudulent conveyance, the defendants are in no sense parties to the transaction. There is no allegation that the biscuit company owes the plaintiff anything, or that it ever did, or attempted to, defraud the plaintiff out of anything; but the allegations are that Gawley owes the plaintiff and that Gawley was undertaking to cheat and defraud plaintiff or his assignor. It is even alleged affirmatively that the assets of the alleged biscuit company are in fact wholly and solely assets of Gawley. We are unable to discover any cause of action which is stated against the defendants.

The judgment will therefore be affirmed.

[No. 9222. Department One. November 15, 1910.]

WILLIAM L. BILGER *et al.*, *Respondents*, v. THE STATE OF
WASHINGTON *et al.*, *Appellants*.¹

APPEAL—SUPERSEDEAS—INJUNCTION—INTEREST OF RESPONDENTS—STATE FUNDS. Upon an appeal from an injunction against the prosecution of a state and Federal canal lowering the waters of a lake, a work of great magnitude, the supreme court will grant a supersedeas pending the appeal, excepting as the riparian rights of the plaintiffs may be affected or their property burdened with assessments, when they would not be prejudiced in any other respect by a supersedeas, and where the improvement fund involved is a state fund under state control, as to the disposition of which individuals will not be heard to complain.

Application filed in the supreme court November 2, 1910, for a supersedeas suspending the operation of a judgment of the superior court for Thurston county, Mitchell, J., entered October 28, 1910. Granted.

The Attorney General, Geo. F. Vanderveer, Harold Preston, Roger S. Greene, and H. A. P. Myers, for appellants.

Thomas A. Meade, for respondents.

PER CURIAM.—This action was instituted by the owners of certain shore lands on Lake Washington to restrain the state, the county of King, and C. J. Erickson, a contractor under the state, from excavating a certain canal connecting Lake Union with Lake Washington; from levying an assessment on the property of the plaintiffs to defray the expenses of such excavation, and from issuing warrants against the state shore land improvement fund created by the act of March 17, 1909, Laws of 1909, p. 746 (Rem. & Bal. Code, § 5032a), for the like purpose. On the trial in the court below, a final judgment was given in favor of the plaintiffs, according to the prayer of their complaint, from which the defendants have appealed.

¹Reported in 111 Pac. 771.

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Since the appeal was perfected the appellants have applied to this court for a supersedeas suspending the operation of the judgment pending the appeal, and the matter is now before us for determination. The injunction complained of is very broad, stopping as it does a public improvement of great magnitude in which both the state and Federal government are interested, and we deem it our duty to suspend its operation pending the appeal, in so far as we can do so without materially affecting the property or property rights of the respondents. So far as we are able to discover from an examination of the record, the respondents can only be prejudiced or injured in their property or property rights by the acts complained of in two ways: First, by lowering the waters of Lake Washington so as to affect their riparian and littoral rights: and second, by imposing burdens on their property by way of taxes or special assessment. The question of lowering the waters of the lake has already been disposed of by an order heretofore entered in this court, so that the second question alone remains. The state shore land improvement fund is a state fund under state control, and private individuals will not be heard to complain of the manner of its disposition. *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067.

The operation of the judgment will therefore be suspended pending the appeal, and until the further order of this court, except in the following particulars: The appellants must still refrain from lowering the waters of Lake Washington, except as heretofore authorized by this court, and the county of King must still refrain from levying or imposing any assessment on the property of the respondents to defray the expenses of excavating the canal. A supersedeas order will be entered forthwith in accordance with this opinion.

[No. 8819. Department Two. November 15, 1910.]

BANK OF CALIFORNIA, *Respondent*, v. UNION PACKING
COMPANY *et al.*, *Appellants*.¹

GUARANTY—CONSTRUCTION—LIABILITY. A written guaranty of advances to be made to a corporation covers a sum advanced upon the promissory note of the company, signed also by two others who were officers and stockholders of the company, the testimony showing that the money went to the credit of the company.

GUARANTY—NOTICE OF ACCEPTANCE—NECESSITY. No notice of acceptance, other than the performance of the consideration, is essential to a written guaranty of advances to be made to a corporation by a bank whereby the guarantors unconditionally agree to pay, and request the bank to advance the money, and reciting that "this is a continuing guaranty and requires no notice to us and is to remain in force until canceled by notice in writing."

GUARANTY—CONSTRUCTION—LIABILITY—COSTS. A guaranty of all advances to be made to a corporation covers attorney's fees provided for in the note given for the moneys advanced.

ACTIONS—PARTIES—JOINDER—NEGOTIABLE INSTRUMENTS—GUARANTORS. The maker of a note and its guarantors under a written guaranty may be joined in one action.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered January 31, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Marshall K. Snell, F. S. Blattner, and L. B. da Ponte, for appellants.

Walter Loveday, Frank H. Kelley, and Raymond J. McMillan, for respondent.

DUNBAR, J.—This is an action by respondent, plaintiff below, against the appellants on a contract of guaranty, which is as follows:

¹Reported in 111 Pac. 573.

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"Tacoma, Washington, March 13th, 1906.

"To the Bank of California,

"Tacoma, Washington.

"Dear Sirs:—We hereby jointly and severally authorize and request you to advance to Union Packing Co. such moneys as they may require from time to time, and for value received we jointly and severally guarantee payment of whatever balance may remain due, not exceeding thirty-five thousand dollars, in United States gold coin, with interest at the rate of seven per cent per annum until paid, and upon failure to pay the amount thereof due by Union Packing Co. we jointly and severally promise to pay the same to you on demand.

"This is intended as a continuing guarantee and requires no notice to us, and is to remain in force until canceled by notice in writing.

"Peter Hale, Chas. Hale, Knute Langlow,
Dirk Blaauw, Union Packing Co.,
Louis Langlow, Treas., Peter Iverson,

"By Louis Langlow, Attorney in Fact.

"Louis Langlow,

"O. J. Ekre."

Respondent alleges that, in pursuance of and on the faith of said contract of guaranty, on or about the 19th day of September, 1906, it loaned to defendant Union Packing Company the sum of \$8,000, evidenced by a promissory note. The note was a joint and several note for \$8,000, with interest at the rate of seven per cent per annum until paid, signed by Louis Langlow, O. J. Ekre, Union Packing Company, Louis Langlow, treasurer. Balance is claimed on this note against all of the defendants, of \$6,218.39, besides interest and attorney's fee. Motions and demurrers were filed and answers by Hale and Blaauw to the effect, in substance, that the plaintiff did not loan to the defendant Union Packing Company the sum of \$8,000, in pursuance and on the faith of an agreement entered into between plaintiff and said defendants. It is alleged that, if the plaintiff did loan such money, it was loaned to the Union Packing Company, Louis Langlow, treasurer, Louis Langlow, and O. J. Ekre, and that the same was not loaned on the faith of any agreement had between plaintiff

and said defendants. Other defendants defaulted, the trial proceeded, and resulted in a judgment against the appellants for the full amount asked for, and the case is brought here on appeal.

There are two propositions contended for by appellants: (1) That the offer to guarantee the indebtedness to be incurred by the Union Packing Company does not cover a promissory note executed by that company and others as their joint and several obligation; (2) that the judgment of the superior court is erroneous because respondent failed to allege and prove that appellants' offer to guarantee was accepted and notice thereof communicated to appellants. The first proposition, it seems to us, is entirely without merit. It is true that appellants cite the case of *Bell v. Norwood*, 7 La. 65, but that case simply held that, where A recommended B to the credit of C and C later made an advance to B and D as a firm, on the faith of the guaranty, the guarantor was not bound thereby. But that is a different proposition from the one under consideration. A person might well be willing to guarantee a payment to an individual whom he knew and with whom he had business relations, when he would not care to extend that guaranty, and did not intend to extend it, to a firm with which the person he intended to accommodate was connected. In the case cited they were two distinct entities, and we think, unquestionably, that that decision was right. But in this case the promissory note in suit was evidence of the indebtedness of the Union Packing Company alone. The record and proof show that all the parties who were parties to the guaranty were officers and stockholders of the Union Packing Company, and the testimony is to the effect that the money went to the credit of the Union Packing Company. This testimony is uncontradicted, for the appellants rested upon the testimony of the respondent and offered none of their own. It was not necessary for Langlow and Ekre to sign the note, as they had already signed the guaranty; but the fact that they did sign the note certainly could not, under

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any circumstances, detract from the effect of the guaranty, or affect it, deleteriously or otherwise.

On the second proposition, it is earnestly contended that the rule is that a guarantor of this character must have notice that the proposition made by him is accepted, and appellants cite many cases to sustain this contention. This, no doubt, is the general rule, because the doctrine of notice is based upon the theory that a mutual assent is necessary to the validity of a contract, and this lack of mutuality is discoverable where one party makes an offer to another the binding force and effect of which necessarily depends upon the consent of the other. It is nothing more than an announcement of the common expression that the minds of the parties must meet in order to constitute a contract, for it is elementary that one party alone cannot be bound. But where, for a consideration, a party obligates himself to do a particular thing, a different rule obtains and an obligation is created. This distinction between a guaranty and an offer to guarantee must not be lost sight of. It will be observed from a perusal of this guaranty that it is not an offer to do anything, but it is the actual doing of something. It is not an agreement to guarantee the payment of money if it is acceptable to the bank, but it is an unconditional agreement that it will pay, and a request to the bank to pay the money. The construction of this instrument has been placed upon it by the parties to it when they say: "This is intended as a continuing guaranty and requires no notice to us, and is to remain in force until canceled by notice in writing." There could scarcely be a plainer waiver of notice than is set forth here. Instead of the burden of notice being put directly or by implication upon the respondent, it is placed upon the signers of the guaranty when it is stated that it is to remain in force until canceled by notice in writing. That cancellation by notice in writing, of course, had reference to a cancellation to be made by the appellants, leaving nothing for the respondent to do.

The distinction between an agreement to guarantee and a

guaranty itself is plainly set forth in one of the citations of appellants, viz: Brandt, Suretyship & Guaranty (3d ed.), § 205 *et seq.*, which is quoted to sustain the general rule contended for, that notice should be given, and the reasons for the rule. The author, in closing the paragraph quoted, says:

"Where the contract is admitted to amount only to an offer to guaranty, it is universally held that in order to charge the party making the offer he must within a reasonable time be notified that his offer is accepted."

The plain implication there is that, where it is a guaranty itself, the other rule prevails; and the authorities cited by the author quoted sustain this distinction. Probably one of the most interesting cases adjudicated on this question is *Davis v. Wells*, 104 U. S. 159. There the guaranty was in the following language:

"For and in consideration of one dollar to us in hand paid by Wells, Fargo & Co. (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co., a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of ten thousand dollars (\$10,000) for any overdrafts now made, or that may hereafter be made at the bank of said Wells, Fargo & Co. This guaranty to be an open one, and to continue one at all times to the amount of ten thousand dollars, until revoked by us in writing."

It would be difficult to find any real distinction between this guaranty and the guaranty in the case at bar. The contention there was that notice had not been given of the acceptance of the guaranty, and that the guarantors should therefore be discharged. But the supreme court of the United States held that this was an unconditional guaranty, and that the guarantors should be bound. We think it not inappropriate to set forth a portion of the announcement of the court, in illustration of the principles governing this kind of a guaranty:

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"The agreement to accept is a transaction between the guarantee and guarantor, and completes that mutual assent necessary to a valid contract between them. . . . And whenever a sufficient consideration of any description passes directly between them, it operates in the same manner and with like effect. It establishes a privity between them and creates an obligation. The rule in question proceeds upon the ground that the case in which it applies is an offer or a proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete, and may be withdrawn by the proposer. Frequently the only consideration contemplated is that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation, on that account, the guarantor undertakes. But a guaranty may well be for an existing debt, or it may be supported by some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation. In both these cases, no notice of assent, other than the performance of the consideration, is necessary to perfect the agreement; for, as Professor Langdell has pointed out in his Summary of the Law of Contracts (Langdell's Cases on Contracts, 987), 'though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and as the want of either is fatal to the promise, the question whether an offer has been accepted can never in strictness become material in those cases in which a consideration is necessary: and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration.' If the guaranty is made at the request of the guarantee, it then becomes the answer of the guarantor to a proposal made to him, and its delivery to or for the use of the guarantee completes the communication between them and constitutes a contract."

In *Deering & Co. v. Mortell*, 21 S. D. 159, 110 N. W. 86, 16 L. R. A. (N. S.), at page 354, notes, the author says:

"When a guaranty is an absolute present guaranty, com-

plete in its terms, fixing the liability of the guarantor, and is not a conditional agreement, it takes effect as soon as acted upon; and notice of acceptance is not essential in order to render it binding. Thus, no notice of acceptance is necessary where the promise made is a conclusive guaranty, and not a mere overture to guarantee. *Jackson v. Yandes*, 7 Blackf. 526. . . . One who writes to a mercantile firm that he will be good for any little things of which the bearer may stand in need enters into a direct promise, rather than a collateral engagement; and no notice of acceptance is necessary. *Scott v. Myatt*, 24 Ala. 489, 60 Am. Dec. 485. A writing whereby those executing it authorize a lumber company to furnish a third person such building materials as he may wish, not exceeding a specified sum, and undertake, in the event of such person's failure to pay, to settle the account on ninety days' notice, constitutes a complete and absolute guaranty as soon as accepted and acted upon by the lumber company, without any notice of such acceptance being given to the defendants. *Platter v. Green*, 26 Kan. 252."

In fact, there are so many citations all holding this doctrine, many of the cases not having as strong indications of an unconditional guaranty as the one at bar, that further citation seems to be unnecessary. We think, unquestionably, under all authority, that the guarantors are held responsible without notice.

Neither do we think that there is any merit in the contention that attorney's fees could not be recovered. This was a suit upon a note against the maker and guarantors, who could all be joined in one action.

The judgment in all things will be affirmed.

RUDKIN, C. J., MORRIS, CROW, and CHADWICK, JJ., concur.

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[No. 8892. Department Two. November 15, 1910.]

P. J. FRANSIOLI, *Respondent*, v. THE CITY OF TACOMA,
Appellant.¹

APPEAL—REVIEW—DECISION—LAW OF CASE. Upon the second appeal, the decision upon a former appeal is the law of the case.

PLEADING—ANSWERS—DENIALS. An answer admitting the receipt of a notice of demand against a city, as set up in one paragraph of the complaint, and denying all the allegations of another paragraph alleging a demand, is not sufficient to put the fact of notice and demand in issue.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered March 15, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

T. L. Stiles, Frank R. Baker, and F. A. Latcham, for appellant.

Walter Loveday, Frank H. Kelley, and Raymond J. McMillan, for respondent.

DUNBAR, J.—The complaint alleged, in substance, that on the 30th day of March, 1907, the defendant city of Tacoma entered into a contract with defendants Thompson & Langford to construct and complete certain improvements on F street; that on the same day the defendants Thompson & Langford and the defendant the Empire State Surety Company made and entered into a bond and agreement in writing, to the state of Washington, to secure the payment of all laborers, mechanics, and materialmen, etc., under the provisions of the statute; that thereafter, on the 13th day of May, 1907, Thompson & Langford made and entered into an agreement in writing with C. D. Elmore for the execution of a part of the work to be performed by the said defendants; that sub-

¹Reported in 111 Pac. 564.

sequent to the making of the contract between Thompson & Langford and the city of Tacoma, the city, by its commissioner of public works, made a change in the plans and specifications under which the contract was to be executed, by the terms of which a concrete retaining wall was to be substituted for a retaining wall of wooden cribbing, as provided for in the original specifications for the said improvement; that thereafter the plaintiff sold and delivered to said C. D. Elmore, subcontractor, a certain amount of cement of the value set forth in the complaint, to be used in the construction of the substituted concrete retaining wall; that the subcontractor, Elmore, was insolvent; that the work was to be performed under the supervision of the commissioner of public works of the city of Tacoma, and that, after the work was completed and accepted, demand was made for the value of the material, which was refused, and suit was brought. All the defendants demurred to this complaint, and their demurrers were sustained. Upon appeal to this court, it was decided that the demurrers of Thompson & Langford and the Empire State Surety Company were properly sustained, but that the demurrer of the city was improperly sustained; and the cause was sent back for trial by the city; whereupon the city answered, denying the material allegations of the complaint. The cause was tried upon its merits, and resulted in a judgment for plaintiff, respondent here. From such judgment, this appeal is taken.

An examination of the record, which is not lengthy, convinces us that the material allegations of the complaint were proven beyond question; and while it is contended by counsel for appellant that the allegations of the complaint were not proven, the contention is, in effect, an argument against the soundness of the rule announced by this court on the former appeal, which opinion may be found in 55 Wash. 259, 104 Pac. 278. To ascertain the scope of that decision, we quote as follows:

“The demurrer of the city we think should have been over-

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ruled. By the terms of the statute (Bal. Code, §§ 5925, 5926, 5927), the city, on letting a contract for the grading of one of its streets, is obligated to take a bond from the contractor to pay the materialmen who furnish material for use in the making of the improvement, under the penalty of itself becoming liable for the cost of the materials so furnished. In the instant case, in so far as this concrete wall is concerned, the city stands in the position of having failed to require a bond to be furnished, as it suffered such a radical change to be made in the original plans as to relieve the bondsmen of their obligation to pay the costs of construction under those plans, and failed to take a bond to cover the additional liability created by the change of plans. We are aware that the city contends that the commissioner of public works had no authority to allow a change in the plan of construction, and that, as a consequence, his acts in that regard are not binding on the city, and create no additional liability on its part. But an inspection of the specifications, which are set out in the complaint, show that the commissioner had general powers of supervision; that he was the person to whom the letting of the contract was intrusted; the person who had power to accept or reject bids for the work; the person with whom the surety bonds must be filed and approved; and the person who must finally approve the work. Moreover, the work was completed and accepted by the city according to the change in the plans, and clearly it is estopped to contend that the change was not authorized."

This last announcement, in reference to the completion of the work, it is said by the appellant, was a mistake; that there was no allegation of that kind in the complaint, and that nothing of the kind was proven. Conceding, which is probably the fact, that this last statement was an inadvertence on the part of the writer of the opinion, it will be seen that this was not the controlling ground of the decision. The whole of appellant's argument under the title of "Law of the Case," is in opposition to this announcement of the court, so far as the responsibility of the city is concerned, and also precludes the contention that a bond was not required in this character of work.

So far as the demand is concerned, even if it could be concluded that a demand was necessary, we are unable to determine that this question was put very clearly in issue. In paragraph 10 of plaintiff's amended complaint, a copy of the notice of demand given to the city is set forth; and in paragraph 11 it is alleged that plaintiff demanded, etc. The answer on this subject is as follows:

"Admits that plaintiff delivered a notice, a copy of which is contained in paragraph 11 of said amended complaint, on or about February 27, 1906, and denies each and every other allegation in said paragraph contained. Denies each and every allegation in paragraph 10 of said complaint."

It will be seen from the pleadings that the notice evidently referred to is a part of paragraph 10 instead of 11, and the announcement that other allegations in that paragraph were denied would naturally be considered as referring to paragraph 10, where the notice admitted was set forth. It was probably not deemed that there was any denial of notice, as no contention of that kind was made below, it evidently being an afterthought.

The judgment is affirmed.

RUDKIN, C. J., MORRIS, CROW, and CHADWICK, JJ., concur.

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Opinion Per MOUNT, J.

[No. 8759. Department One. November 15, 1910.]

C. C. WARWICK, *Appellant*, v. WILLIAM WARWICK,
Respondent.¹

SPECIFIC PERFORMANCE—EVIDENCE—SUFFICIENCY. In an action for specific performance, findings to the effect that no enforceable contract was made are warranted by the evidence, where the defendant testified that he had offered to sell the land to his son for \$800 cash, and at one time agreed to deliver a deed if the son would give a note for the amount, but the son did not do either, and \$400 received from the son on different occasions was for work done.

SAME—IMPROVEMENTS—OFFSET — RENTAL VALUE. Upon denying specific performance of a land contract which was never consummated, the plaintiff is not entitled to recover the value of improvements and taxes paid, where the same amounted only to the rental value of the property occupied by the plaintiff.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered December 29, 1909, in favor of the defendant, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

Conway & Snider, for appellant.

A. M. Abel and *W. H. Abel*, for respondent.

MOUNT, J.—This action was brought by a son to enforce specific performance of an oral contract to purchase a lot in the city of Aberdeen from his father. The complaint alleged that, in January, 1905, the respondent agreed to sell the lot in question to the appellant for the sum of \$800, to be paid in installments of \$10 per month while the respondent lived with the appellant, and \$20 per month while the respondent lived elsewhere; that in pursuance of the agreement, the appellant took possession of the lot, paid taxes, and made improvements thereon; that the respondent lived with the appellant; that all the terms of the agreement had been complied

¹Reported in 111 Pac. 568.

with, and that on August 2, 1909, appellant tendered to the respondent the remainder of the purchase price, viz., \$130, and demanded a deed, which respondent refused to give. The respondent denied all the allegations of the complaint, except that he had made his home with the appellant until about June 1, 1909. He also set out certain affirmative matters not necessary to be mentioned. At the trial of the case, the court found that no definite agreement had ever been made between the parties, and therefore dismissed the action. The plaintiff has appealed.

The only questions in the case are questions of fact. The appellant testified that he had made an agreement substantially as alleged in the complaint, and that he had made the monthly payments; while the respondent denied that he had made such a contract. He testified that he had agreed to sell the lot to his son for \$800 cash, and that at one time he had executed a deed to his son, and offered to deliver the deed if his son would give him a note for that amount; but that the son never did so, and never paid any of the purchase price. He also testified that he had received as much as \$400 from his son upon different occasions, but that no part of this money was paid upon the purchase price of the lot, but it was paid for work which respondent had done for the appellant. There are circumstances in the case which tend to corroborate the respondent. The court, after seeing the witnesses and hearing the evidence, was not convinced that any enforceable contract was entered into. We think the court was justified under the evidence in so finding.

It is claimed by the appellant that the court should have entered a judgment for the value of the improvements made by appellant upon the premises. The evidence shows that the son made some improvements upon the property, but there was much conflict as to their value. The improvements and the taxes paid were about equal to the rental value of the property.

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Syllabus.

We find no error in the record, and the judgment is therefore affirmed.

RUDDIN, C. J., PARKER, GOSE, and FULLERTON, JJ.,
concur.

[No. 9004. Department One. November 15, 1910.]

J. M. SIMMONS *et al.*, *Appellants*, v. JESSIE MACOMBER *et al.*,
Respondents.¹

CANCELLATION OF INSTRUMENTS—DEEDS — MUTUAL MISTAKE — ESTOPPEL. Where a father, after conveying a life estate, deeded the reversion in consideration of an agreement that the grantees should care for and educate his three infant children until they became eighteen years of age, and the grantees failed to care for the children, but allowed the life tenants to perform the consideration and treat the land as their own for sixteen years, and then agreed to and participated in a different testamentary disposition of the property by the life tenants, they cannot claim a mutual mistake and want of consideration in agreeing to such testamentary disposition because of representations by the life tenants to the effect that the first deed conveying a life estate was lost and that the life tenants had since acquired the fee simple title.

WILLS — TESTAMENTARY DISPOSITION — DEEDS — CONSTRUCTION. Where old people called their children together and the parties agreed upon a division of the real property, deeded to the children with a life estate reserved, the deeds being delivered to the county auditor to be recorded after the grantors' deaths, and, at the same time, the grantees in one of the deeds made a deed of a certain tract to three grandchildren of the old people, at their request, containing a proviso "that this deed shall be void and of no effect until our death," the transaction amounts to a testamentary disposition by the old people, and not by the grantors in the last deed.

WILLS—TESTAMENTARY DISPOSITION—DEEDS—RECALL. A change in the custody of such deeds, from the county auditor to a son of the grantors, does not amount to a recall of the deeds.

DEEDS—DELIVERY. The delivery of the last mentioned deed in favor of the grandchildren to the grandparents, at whose request it was made, is in effect a delivery to the grandchildren.

¹Reported in 111 Pac. 579.

CANCELLATION OF INSTRUMENTS—ACTIONS—DISMISSAL—EFFECT—QUIETING TITLE. The dismissal, on the merits, of an action to cancel a deed has the effect of quieting the title of the defendants.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered May 7, 1910, in favor of the defendants, after a trial on the merits before the court without a jury, in an action to vacate a deed. Affirmed.

W. H. Abel, for appellants, contended, among other things, that the deed is testamentary in character and subject to revocation. 2 Devlin Deeds, § 854; *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. (N. S.) 645; *McGarigle v. Roman Catholic Orphan Asylum*, 145 Cal. 694, 79 Pac. 447, 104 Am. St. 84, 1 L. R. A. (N. S.) 315; *Murphy v. Gabbert*, 166 Mo. 596, 66 S. W. 536, 89 Am. St. 733; *Pinkham v. Pinkham*, 55 Neb. 729, 76 N. W. 411; *Sperber v. Balster*, 66 Ga. 317; *Cunningham v. Davis*, 62 Miss. 366; *Sappingfield v. King*, 49 Ore. 102, 89 Pac. 142, 90 Pac. 150, 8 L. R. A. (N. S.) 1066; *Schuffert v. Grote*, 88 Mich. 650, 50 N. W. 657, 26 Am. St. 316; *Leaver v. Gauss*, 62 Iowa 314, 17 N. W. 522; *Templeton v. Butler*, 117 Wis. 455, 94 N. W. 306; *Coulter v. Shelmadine*, 204 Pa. 120, 53 Atl. 638; *Hazleton v. Reed*, 46 Kan. 73, 26 Pac. 450, 26 Am. St. 86; *Carlton v. Cameron*, 54 Tex. 72, 38 Am. Rep. 620; *Donald v. Nesbit*, 89 Ga. 290, 15 S. E. 367. The mutual mistake as to the ownership warrants appropriate equitable relief. 20 Ency. Plead. & Prac., 813-819; 9 Cyc. 401; 1 Story, Equity Jurisprudence, §§ 121-2-3, 130, 131; Sugden, Vendors (8th Am. ed.), pp. 533 *et seq.*; *Bingham v. Bingham*, 1 Ves. Sr. 126; *Martin v. Bennett*, 8 Paige Ch. 311; *Willan v. Willan*, 16 Ves. Jr. 72; *Cooper v. Phibbs*, L. R., 2 H. L. 149, 16 L. T. 678; *Griffith v. County of Sebastian*, 49 Ark. 24, 3 S. W. 886; *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 556; *Stewart v. Stewart*, 6 Clark & F. 911; *Martin v. McCormick*, 8 N. Y. 331; *Hitchcock v. Giddings*, 4 Price (Eng. Ex.) 135; *Lawrence v. Beau-*

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Citations of Counsel.

bien, 2 Bailey (S. C.) 623, 23 Am. Dec. 155; *Morgan v. Dod*, 3 Colo. 551; *Goettel v. Sage*, 117 Pa. St. 298, 10 Atl. 889. A contract will not be enforced when it is based upon the supposed existence of a certain fact which does not exist. Bishop, Contracts, § 588; 1 Page, Contracts, § 72; *United States v. Charles*, 74 Fed. 142; *Rogers v. Walsh*, 12 Neb. 28, 10 N. W. 467; *Fink v. Smith*, 170 Pa. 124, 32 Atl. 566, 50 Am. St. 750; *Gibson v. Pelkie*, 37 Mich. 379; *Riegel v. American Life Ins. Co.*, 153 Pa. 134, 25 Atl. 1070, 19 L. R. A. 166; *Allen v. Hammond*, 11 Pet. 63; *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919, 11 Am. St. 531; *Martin v. McCormick*, *supra*; *Whelen's Appeal*, 70 Pa. St. 410; *Dill v. Shahan*, 25 Ala. 694, 60 Am. Dec. 540; *Alabama etc. R. Co. v. Jones*, 73 Miss. 110, 19 South. 105, 55 Am. St. 488, and note; *Underwood v. Brockman*, 4 Dana 309, 29 Am. Dec. 407. Where a mistake is coupled with fraud, or inequitable conduct on part of other party, equity will relieve. *Williams v. Hamilton*, 104 Iowa 423, 73 N. W. 1029, 65 Am. St. 475; *Allen v. Hammond*, *supra*; *Adams v. Washington Brick, Lime & Mfg. Co.*, 38 Wash. 243, 80 Pac. 446. Even a mistake of law under the conditions existing in this case, is sufficient in equity to cancel the deed. 2 Pomeroy, Equity Jurisprudence, §§ 841-853; *Hunt v. Rhodes*, 1 Pet. 1, 15; *Bank of United States v. Daniel*, 12 Pet. 32; *Toland v. Corey*, 6 Utah 392, 24 Pac. 190; *Page v. Higgins*, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152, 155, and note; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835, and note; *Jordan v. Stevens*, *supra*; *Griffith v. Townley*, 13 Mo. 22, 33 Am. Rep. 476; *Renard v. Clink*, 91 Mich. 1, 51 N. W. 692, 30 Am. St. 458; *Blakemore v. Blakemore*, 19 Ky. Law 1619, 44 S. W. 96; *Castleman v. Castleman*, 184 Mo. 432, 83 S. W. 757; *Ross v. Armstrong*, 25 Tex. (Supp.) 354, 78 Am. Dec. 574; *Duncan v. New York Mutual Ins. Co.*, 138 N. Y. 88, 33 N. E. 730, 20 L. R. A. 386; *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614. There is no delivery to the

grantee where the deed is given to a third person for safe keeping. 1 Devlin, Deeds, § 279a; 13 Cyc. 566; *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 South. 500; *Cannon v. Cannon*, 26 N. J. Eq. 316; *Elsev v. Metcalf*, 1 Den. 323; *Perkins v. Thompson*, 123 N. C. 175, 31 S. E. 387; *Carr v. Hoxie*, 5 Fed. Case, No. 2,438; *Spacy v. Ritter*, 214 Ill. 266, 73 N. E. 447; *Emmons v. Harding*, 162 Ind. 154, 70 N. E. 142; *Mudd v. Dillon*, 166 Mo. 110, 65 S. W. 973; *Stockwell v. Williams*, 68 N. H. 75, 41 Atl. 973; *Peck v. Rees*, 7 Utah 467, 27 Pac. 581, 13 L. R. A. 714; *O'Connor v. O'Connor*, 100 Iowa 476, 69 N. W. 676; *Porter v. Woodhouse*, 59 Conn. 568, 22 Atl. 299, 21 Am. St. 131, 13 L. R. A. 64; *Fitch v. Bunch*, 30 Cal. 209; *Bank of Healdsburg v. Bailhache*, 65 Cal. 327, 4 Pac. 106; *Munro v. Bowles*, 187 Ill. 346, 58 N. E. 331, 54 L. R. A. 865, note; *Maynard v. Maynard*, 10 Mass. 456, 6 Am. Dec. 146; *Bettinger v. Van Alstyne*, 29 N. Y. Supp. 904; *Weber v. Christen*, 121 Ill. 91, 11 N. E. 893, 2 Am. St. 68. Delivery is only complete when the deed is accepted. 13 Cyc. 570; *Stallings v. Newton*, 110 Ga. 875, 36 S. E. 227; *Brown v. Brown*, 167 Ill. 631, 47 N. E. 1046; *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75; *Pratt v. Griffin*, 184 Ill. 514, 56 N. E. 819; *Knox v. Clark*, 15 Colo. App. 356, 62 Pac. 334; Ballard, Law of Real Property, §§ 133-137.

Forney & Ponder, for respondents, contended, among other things, that the deed was a grant *in praesenti*, and not of testamentary character. *Wilson v. Carrico*, 140 Ind. 533, 40 N. E. 50, 49 Am. St. 213; *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678; *White v. Hopkins*, 80 Ga. 154, 4 S. E. 863; *Bunch v. Nicks*, 50 Ark. 367, 7 S. W. 563; *Wyman v. Brown*, 50 Me. 139; *Abbott v. Holway*, 72 Me. 298; *Shackelton v. Sebree*, 86 Ill. 616; *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548; *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986; *West v. Wright*, 115 Ga. 277, 41 S. E. 602; *Abney v. Moore*, 106 Ala. 131, 18 South. 60; *Hunt v. Hunt*, 119 Ky. 39, 82 S. W. 998, 68 L. R. A. 180; *Phillips v. Thomas Lum-*

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ber Co., 94 Ky. 445, 22 S. W. 652, 42 Am. St. 367; *Rawlings v. McRoberts*, 95 Ky. 346, 25 S. W. 601; *Merck v. Merck*, 83 S. C. 329, 65 S. E. 347; *Nolan v. Otney*, 75 Kan. 311, 89 Pac. 690; *Pentico v. Hays*, 75 Kan. 76, 88 Pac. 738, 9 L. R. A. (N. S.) 224; *Brady v. Fuller*, 78 Kan. 448, 96 Pac. 854; *Love v. Blauw*, 61 Kan. 496, 59 Pac. 1059, 78 Am. St. 334, 48 L. R. A. 257; *Rogers v. Rogers* (Miss.), 43 South. 434; *McIntyre v. McIntyre's Estate*, 156 Mich. 240, 120 N. W. 587; *Lefebure v. Lefebure* (Iowa), 121 N. W. 1025; *Dick v. Miller*, 150 N. C. 63, 63 S. E. 176; *Dexter v. Witte*, 138 Wis. 74, 119 N. W. 891; *Garrison v. McLean* (Tex.), 112 S. W. 773; *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337, 112 Am. St. 152, 4 L. R. A. (N. S.) 816.

MOUNT, J.—This action was brought by the appellants to set aside a deed to certain real estate, on the grounds of want of consideration, mistake, and fraud. The respondents denied the allegations upon which the complaint sought to avoid the deed, and by cross-complaint sought to quiet title. The trial court, after hearing the evidence, denied the relief prayed for by the complaint, and granted the prayer of the defendants. The plaintiffs have appealed.

It appears that, in the year 1891, Isaac Calvin Garrard owned the land in controversy. At that time there was a mortgage upon the land for \$1,000. He had three infant children, who are now the respondents in this case. Desiring to pay the debt owing upon his land and at the same time provide for the support and education of his three minor children, he deeded the land in controversy to his father and mother, James A. Garrard and Hannah Garrard, during their natural lives, with the remainder to his sister and brother-in-law, Mary Eliza Simmons and J. M. Simmons, the appellants here. The expressed consideration in this deed was \$5,000, but the actual consideration was the assumption by the father of the mortgage debt of \$1,000 owing upon the land, and the support, education, and care of the three minor children

by appellants until the children should arrive at the age of eighteen years. Upon the execution of this deed, James A. Garrard and Hannah Garrard went into possession of the property. They afterwards paid the debt, and the appellants took the children to care for them. It appears that the appellants did not get along well with the three minor children, and that, long before they arrived at the age of eighteen years, they were taken and cared for by their grandfather and grandmother, James A. Garrard and Hannah Garrard, until they were able to care for themselves. In the meantime James A. Garrard and Hannah Garrard had remained in possession of the land, and had treated it as their own. They sold timber therefrom and conveyed away portions of the land. The deed from Isaac Calvin Garrard had not been recorded. It was supposed to be lost, and appellants testified that James A. Garrard during his lifetime said that he had obtained a new deed from his son Isaac Calvin Garrard.

In the year 1905, James A. Garrard and Hannah Garrard, being then quite old and desiring to dispose of their real estate by deed among their three children, Isaac Calvin Garrard, Ed. Garrard, and Mary Eliza Simmons (the last named being one of the appellants), called the said children together and informed them of such intention. It appears that a satisfactory division was agreed upon, and a deed was executed by which James A. Garrard and Hannah Garrard conveyed all their real estate to the three children above named. This deed reserved a life estate in the grantors, and it was agreed that the deed should be left with the county auditor of Lewis county, and not recorded until the death of the grantors. At the time this deed was made and as a part of the same transaction, the deed in controversy was made. The appellants, at the request of James A. Garrard and wife, executed a deed conveying the land in controversy to respondents. The deed recited:

“The interest of the parties of the second part in and to the above described property to be as follows: To Jessie

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Macomber or her children (but not her present husband) an undivided one-fourth interest; to Myrtle Macomber, an undivided one-half interest (in the event of her death to go to her heirs); to Henry Garrard or his heirs, an undivided one-fourth interest. Disposition of this property being made according to the wishes of James A. Garrard and Hannah Garrard his wife; Provided this deed shall be void and of no effect until our death."

This deed was executed by the appellants and delivered to James A. Garrard, to be sent to the county auditor, but not recorded until the death of James A. Garrard and Hannah Garrard. At the same time James A. Garrard and Hannah Garrard executed a deed conveying the same property to the appellants, "in trust during the lifetime of said parties of the second part, and to be by them conveyed to Jessie Macomber, Henry Garrard and Myrtle Macomber, or their heirs, at the death of the parties of the second part." This deed was also, at the request of James A. and Hannah Garrard, to be delivered to the county auditor and not recorded until the death of James A. and Hannah Garrard. After this transaction, Isaac Calvin Garrard, the father of these respondents, sold to the appellants his interest in his father's estate for \$1,500, and took a mortgage on the land in controversy to secure the payment. This mortgage was afterwards paid by the appellants and satisfied. After these instruments were made and delivered to the county auditor to be held until the death of the older Garrards, it was discovered that the deed from Isaac Calvin Garrard had never been recorded. The deed was subsequently found and placed of record. The deeds placed with the county auditor in 1905 were recalled by James A. Garrard and placed in the hands of his son Ed. Garrard, named as executor of the will disposing of his personal estate; and after the death of the old people, these deeds were all placed of record. Some later deeds were made by the older Garrards during their lifetime, but we find nothing to indicate a new or changed disposition of the property in dispute.

It is argued by the appellants, (1) that the deed in question is testamentary in character, and therefore subject to revocation by the grantors; (2) that the deed was executed under a mutual mistake as to the title of the grantors; (3) that there was no consideration for the deed and no delivery thereof; and (4) that the respondents were not entitled to affirmative relief. A number of cases are cited by the appellants to the effect that a deed delivered to a custodian to be delivered after the death of a grantor passes no present interest in real estate and may be recalled. Many cases are cited by the respondents to the effect that with a clause in a deed limiting the conveyance to a period commencing after the death of the grantor, where there are also words of grant *in praesenti*, the deed should be construed as a conveyance of a present interest with the reservation of a life estate. It is conceded that the authorities are in conflict upon this question. It is not necessary, however, in this case to follow either rule strictly, for it may be conceded, for the purposes of this case, that a deed testamentary in character may be revoked by such testamentary grantor at any time before his death. The deed in question, upon its face, is somewhat ambiguous, for it grants a present interest, and recites: "The disposition of this property being made according to the wishes of James A. Garrard and Hannah Garrard, his wife; Provided this deed shall be void and of no effect until our death." At the time this deed was made, it was supposed by all the interested parties that James A. and Hannah Garrard were the owners of the fee. They were in possession, and for sixteen years had treated the land as their own. Their children, including these appellants, so treated and considered them such owners. James A. and Hannah Garrard were attempting to divide all their real estate equally between their three children. They desired to give the land in dispute to these appellants during their lifetime, with the remainder to their three grandchildren, these respondents. They went before a notary public and explained their desires, with the re-

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sult that the land was deeded by James A. and Hannah Garrard to the appellants "in trust during the lifetime of said parties of the second part [appellants] to be by them conveyed to Jessie Macomber, Henry Garrard and Myrtle Macomber, or their heirs, at the death of the parties of the second part." It seems clear, therefore, that the testamentary disposition was being made by James A. and Hannah Garrard, and not by these appellants. These appellants made the deed at the request of their father and mother, and in consideration that a life estate should be reconveyed to appellants. The deeds upon their face show this, as well as the circumstances surrounding the transaction.

It was testified by the appellants that, in order to induce them to make the deed in question, the old gentleman Garrard said that he had lost the deed by which his son Isaac had conveyed the property to him, and that he had a new deed which gave him the fee; and that the appellants thinking (the deed being lost), their title was lost, and not knowing at that time that they were by such deed the owners of the fee, and not being informed thereof until afterwards when the lost deed was found and placed of record, they were thereby fraudulently induced to execute the deed in question. In view of the fact that the appellants had failed to care for the children of Isaac Garrard during their infancy, and thus pay the consideration for the deed, and in view of the fact that James A. and Hannah Garrard, the grandparents of the minors, had taken the children and cared for them during their infancy and had paid the whole consideration for the property, and in addition had occupied the property and had claimed to own it, and had treated it as their own, and that appellants knew these facts and made no claim to the property, and did not attempt to avoid the deed in question during the lifetime of James A. and Hannah Garrard, the trial court properly, we think, gave little weight to the testimony relating to the lack of knowledge of the true state of appellants' title. We think the facts and circumstances in evidence in the case show

that there was no testamentary disposition of the property in dispute by the appellants, but such disposition was being made by James A. and Hannah Garrard, who never attempted to recall the deed. It is true that, at his request, the custody of the deed was changed from the county auditor to his son "Ed," who was named as executor of the will disposing of his personal estate. But there is no evidence to show that the old gentleman desired to change or recall the deeds disposing of the property in question.

What we have said above disposes of the question of mutual mistake and consideration. It is argued that there was no delivery of the deed which is sought to be set aside. When this deed was executed, it was delivered to James A. Garrard, at whose instance it was prepared. It is true it was not delivered to the grantees, but it was delivered to the old gentleman for them. Appellants claim the delivery was to the old gentleman as their agent, and not as agent of the respondents; but the circumstances indicate that he was solicitous for the respondents, and was acting for their interests, and when the deed was delivered to him it was, in effect, a delivery to the respondents.

It is also argued that the court erred in granting affirmative relief. The dismissal of the action would, in effect, quiet title as against the claims of appellants, and hence it was not error to adjudge the same relief affirmatively.

Finding no error in the record, the judgment is affirmed.

RUDKIN, C. J., PARKER, GOSE, and FULLERTON, JJ.,
concur.

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[No. 9162. Department Two. November 15, 1910.]

THOMAS F. TRUMBULL *et al.*, Respondents, v. JEFFERSON
COUNTY *et al.*, Appellants.¹

APPEAL—DISMISSAL—CESSATION OF CONTROVERSY — RECORD — CONCLUSIVENESS—AFFIDAVITS. A cessation of the controversy, by reason of a transfer of the interests of one of the parties prior to the trial or to the making up of the issues, cannot be shown in the supreme court by affidavits contradicting the record made by the judgment and statement of facts, no mention of such transfer having been made in the pleadings or proceedings and no notice having been taken thereof until after appeal taken.

LIS PENDENS—RULE OF—EFFECT—APPEAL—BENEFIT OF. After the filing of a *lis pendens*, a grantee of the real estate, the subject-matter of the suit, is entitled to the benefit of an appeal taken by his grantor, the rule of *lis pendens* being that the action may proceed without any notice being taken of the grantee *pendente lite*.

Motion to dismiss an appeal from a judgment of the superior court for Jefferson county, Still, J., entered April 5, 1910, in an action to vacate a tax judgment and deed. Denied.

A. W. Buddress and James W. B. Scott, for appellants.

Trumbull & Trumbull, for respondents.

CROW, J.—This action was commenced by Thomas F. Trumbull and Lida P. Trumbull, his wife, against Jefferson county and Harry Hart, its treasurer, to vacate a tax foreclosure judgment and set aside a tax deed affecting real estate to which the plaintiffs claim title. From a decree in their favor, the defendants have appealed.

The present hearing is upon respondents' motion to dismiss the appeal. They contend that, since the commencement of the action and prior to judgment, the county conveyed its interest in the real estate to one P. M. Coyne; that the appellants are not aggrieved by the final judgment, and cannot prosecute this appeal. In support of their motion

¹Reported in 111 Pac. 569.

they have filed affidavits and certified copies of records showing that, when this action was commenced, they filed a notice of *lis pendens* with the auditor of Jefferson county, and that on the next day the appellant Harry Hart, as treasurer of Jefferson county, sold to P. M. Coyne all the right, title, and interest of the county in and to the real estate. The transcript shows that the action was commenced on April 10, 1908. No suggestion of the sale to Coyne appears in any of the pleadings, although the issues were not completed until March 9, 1910, the date of the trial. From the statement of facts it appears that the cause was tried on the issues raised between the respondents and appellants; that no mention of the transfer to P. M. Coyne was made during the trial, and that no motion was made to substitute him as a defendant.

Respondents' contention is that, by reason of the transfer, the county has no further interest in the subject-matter of the action, and that the controversy has ceased. In support of their contention they cite a number of cases from this court in which it appeared that some action such as a satisfaction of the judgment had occurred, which determined the controversy. Here nothing changing the situation of the parties has occurred since judgment. The deed upon which respondents now predicate their motion to dismiss was executed and recorded almost two years before the trial. Not a suggestion of the transfer was made prior to trial, judgment, or appeal. The statement of facts has attached thereto the certificate of the trial judge, under date of June 13, 1910, that it contains all material facts, matters, and proceedings theretofore occurring in the cause and not already a part of the record. The appellants now support their motion by a showing that the transfer was made prior to the framing of the issues, after the commencement of the action, and long prior to trial or judgment. Matters outside of the record occurring after judgment, which affect the right of an appellant to prosecute his appeal, may be shown to and considered by the appellate court on a motion to dismiss. But

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no such showing should be permitted as to matters occurring prior to judgment. They should be incorporated in the record by proper procedure at the instance of the litigant who intends to rely upon them. In *Merriam v. Victory Min. Co.*, 37 Ore. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997; discussing this rule of practice, the court well said:

"It is quite well settled that evidence of facts outside of the record, occurring after the rendition of the judgment in the court below, and which affect the proceedings of the appellate court, when deemed necessary, will be received and considered by such court for the purpose of determining its action: *Ehrman v. Astoria R. Co.*, 26 Or. 377 (38 Pac. 306); *Dakota County v. Gilidden*, 113 U. S. 222, 28 L. Ed. 891 (5 Sup. Ct. 428); *Elwell v. Fosdick*, 134 U. S. 500, 33 L. Ed. 998 (10 Sup. Ct. 598). But the record of the court below, upon which the appeal is based, cannot be contradicted or varied by an *ex parte* showing in the appellate court."

Notwithstanding the existence of the alleged transfer to Coyne, made two years prior to the trial, the respondents failed to plead or prove the same. They predicated no claim on the transfer in the court below, but during the trial upon the merits, at all times treated the county and its treasurer as the only necessary parties in interest. A *lis pendens* was filed, and any one thereafter making a purchase of the land would be bound by the judgment against the appellants to the same extent as if he were a party to the action. Rem. & Bal. Code, §§ 243, 803, 806. Our code expressly provides that no action shall abate by the transfer of any interest therein. In *Box v. Kelso*, 5 Wash. 360, 31 Pac. 973, this court said:

"At common law the death of the plaintiff, or the termination of his interest in the subject-matter of the action, was good ground upon which to base a plea in abatement. But under our statute the rule is different. By § 134 [179, Rem. & Bal.] of the Code of Procedure, it is provided that 'every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law.' But this

section must be taken in connection with § 147 [193, Rem. & Bal.] by which its operation is limited. The latter section provides that 'no action shall abate by the death, marriage or other disability of the party, or by the transfer of any interest therein, if the cause of action survive or continue; but the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his representatives or successors.' Under the provisions of § 147 this action did not abate, even if, as appellants claim, the interest of the respondents therein was transferred to their assignee *pendente lite*. And this being so, we think that the respondents were entitled to prosecute it, in their own names, to final judgment. If the assignee became entitled to the interest of the plaintiffs in the action he was the proper party to move in the matter of substitution, and not the defendants. *Smith v. Harrington*, 3 Wyo. 503, 27 Pac. 803. As against the latter the plaintiffs had a right to remain in court until their case was tried. *Moss v. Shear*, 30 Cal. 467."

After the county transferred its interest to Coyne, he either could have been substituted as a party defendant on his motion, or he could have consented to a continuation of the action in the name of his grantors for his benefit. The final judgment would adjudicate his rights. Under the doctrine of *lis pendens*, if he so elected, he should be permitted to obtain, in the names of his grantors, by appeal if necessary, any benefit resulting from the litigation. Had the county obtained judgment, the present respondents could have prosecuted an appeal, and they cannot now insist that rights of the appellants' vendee cannot be protected by an appeal prosecuted by his grantors for his benefit.

In a foot note to *Stout v. Philippi Mfg. & Mercantile Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. 843, at page 857, Mr. Freeman, sustaining his position by numerous citations of authority, thus states the rule:

"The rule of *lis pendens* is, as to persons and property within its operation, that a court having jurisdiction of a suit or action is entitled to proceed to the final exercise of that jurisdiction, and that it is beyond the power of either

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of the parties to prevent its doing so, by any transfer or other act made or done after the service of the writ, or the happening of such other act as may be necessary to the commencement of *lis pendens*. If either of the parties assumes to make, after the law of *lis pendens* has become operative, any transfer of the subject-matter of the litigation, or to create any incumbrance or charge against it, or to enter into any contract affecting it, or to deliver possession of it to another, the action or suit may proceed without taking any notice whatever of such transfer, encumbrance, or change in possession, and the final judgment or decree, when entered, may be carried into effect notwithstanding the attempted dealing with the subject-matter thereof;”

The rule thus stated should be applied for the benefit of the vendee of either party, and we hold that the appellants, on the record before us, are entitled to prosecute this appeal for the benefit of their grantee who obtained his rights, subsequent to the commencement of this action and the filing of the notice of *lis pendens*. When a party makes a purchase of real estate the subject-matter of a pending action, such action will be deemed as still pending until its final determination on appeal, and a motion to dismiss the appeal because of such purchase and transfer should be denied, as the appeal is for the benefit of the vendee. *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844.

In *Moore v. Jenks*, 173 Ill. 157, 165, 50 N. E. 698, the court said:

“It is well settled, that, while a grantee or vendee or assignee *pendente lite* may not be a necessary party to the proceeding, yet his interests are represented by the vendor or grantee or assignor, who is a defendant to the proceeding. Thus, in *Norris v. Ile*, 152 Ill. 190, we said: ‘The purchaser *pendente lite* is not a necessary party, because his vendor or grantor continues as the representative of his interests, and the plaintiff or complainant may ignore his purchase and proceed to final decree against the original parties.’ It follows that, under the circumstances of this case, appellant has a right to appeal as the representative of those holding under him, who are not parties to the suit. It would be a gross in-

justice to hold that a purchaser *pendente lite* is not a necessary party to a proceeding, and yet to hold that he has no right to appeal, or right of review by writ of error, through the defendant under whom he holds."

The motion is denied.

RUDKIN, C. J., DUNBAR, CHADWICK, and MORRIS, JJ.,
concur.

[No. 8999. Department One. November 15, 1910.]

MINNIE B. P. NUNN *et al.*, Appellants, v. A. G. MATHER
et al., Respondents.¹

JUDGMENT—RES JUDICATA—DISMISSAL ON THE MERITS. In an action to quiet title, a formal judgment reciting that after the plaintiffs had rested and their case being fully closed, the case was dismissed "for lack of equity," conclusively shows a decision on the merits; and the same is *res judicata* and a bar to another action between the same parties seeking the same relief.

JUDGMENT—RECORD—CONCLUSIVENESS. The formal signed judgment showing a dismissal on the merits cannot be controlled or affected by the clerk's informal journal entry indicating a judgment of nonsuit only.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 1, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action of ejectment, and to quiet title. Affirmed.

Hastings & Stedman, for appellants.

Byers & Byers, for respondents.

GOSE, J.—The object of this suit is to have the plaintiffs adjudged to be the owners in fee of certain lots in West Seattle, and to have the possession thereof restored to them. The complaint alleges, *inter alia*, that the plaintiffs are the owners of the premises in fee, and are entitled to the immedi-

¹Reported in 111 Pac. 566.

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ate possession of the same; that for more than two years the defendants have been wrongfully in possession of the premises; that they have held the possession under a tax deed executed to them by the treasurer of King county, pursuant to judgments and sales in two tax foreclosure suits prosecuted against their immediate grantors, and that on the motion of the plaintiffs, the tax judgments have since been vacated. The answer admits that the defendants are holding possession and asserting title to the premises under the tax deed; affirmatively alleges that the controversy has been heretofore adjudicated in their favor in an action between the same parties involving the same subject-matter, commenced and determined in the court where this action was commenced; and asserts that the judgment vacating the tax judgments is void. The reply admits that the former action was brought and dismissed, but denies, in effect, that the controversy is *res judicata*. The case was tried to the court. The defendants, to sustain the plea of *res judicata*, offered in evidence the pleadings and decree in the former action. The parties and the subject-matter are the same in both suits. The complaint in the former suit alleged ownership in fee in the premises in the plaintiffs, that the tax deed under which the defendants assert title is void for want of service of process in the foreclosure proceedings, that the deed is a cloud on the plaintiffs' title, and that, prior to the commencement of the action, the tax judgments were vacated on the motion of the defendants. The prayer was that the tax deed be cancelled and annulled, and that the plaintiffs be adjudged the owners in fee of the premises. After issue was joined, the court entered the following decree, which the defendants assert is *res judicata* of the present controversy:

"This cause came on regularly to be heard pursuant to assignment on February 4th, A. D. 1908, the plaintiff appearing in person and by their attorney A. H. Nunn, the defendants appearing in person and by their attorneys Byers

& Byers; evidence on the part of plaintiffs both documentary and oral was introduced, and the plaintiffs having rested and their case being fully closed, the defendants thereupon moved the court that the cause be dismissed for lack of equity, and the court, having heard said motion and being fully advised, granted the same.

"Wherefore, by virtue of the law it is hereby ordered, adjudged, and decreed: That said action be and the same hereby is dismissed, and that the defendants do have and recover of and from the plaintiffs their costs and disbursements herein to be taxed, and that they have execution therefor."

This judgment was affirmed upon appeal. *Nunn v. Stewart*, 52 Wash. 513, 100 Pac. 1004. There was a decree for the defendants. The plaintiffs have appealed.

The appellants contend that the judgment is one of nonsuit, is not *res judicata*, and that the record must be read as an entirety in determining the effect to be given to the judgment. The clerk's entry, dated February 14, 1908, states: "Defendants' motion for nonsuit and dismissal granted." At the close of the plaintiffs' evidence in the former case, the defendants therein moved the court for a "nonsuit," on four distinct grounds: (1) that the plaintiffs had not shown that they had any title; (2) that the defendants were in possession; (3) that a proper tender of taxes was neither alleged nor proven; and (4) that the tax foreclosure proceedings were regular and valid, and that the judgment theretofore entered vacating the tax judgments was void.

In passing on the motion for a new trial, the court said there was no proper tender of taxes. However, after the motion for a new trial had been denied, and on March 27, 1908, the formal and final judgment, which we have set forth at length, was entered. As we have said, the subject-matter and the parties are the same in the two actions. We think the judgment in the former case was upon the merits. The only ground upon which the present action can rest is the invalidity of the tax foreclosure proceedings, and that was the

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very question presented in the former case. There is a great diversity of view in the decided cases as to the legal effect of a judgment entered in a case where several causes of action are set forth in the complaint, or several defenses are set forth in the answer, and the judgment is a general one not specifying the ground upon which it was entered. In such cases many courts, including this court, have held that both the record and parol evidence may be resorted to where the plea of *res adjudicata* has been interposed in a later suit for the purpose of determining precisely what was adjudicated in the earlier case. *Marble Savings Bank v. Williams*, 23 Wash. 766, 63 Pac. 511, expounds this view. In that case the court truly observed that:

"The essential thing to determine is, whether or not the question involved in the second suit was actually litigated in the first. The doctrine of *res adjudicata* is based upon this proposition. . . . if it does not conclusively appear from the record that the matter in dispute was adjudicated, evidence will be admissible to ascertain that fact."

In *Smith v. Auld*, 31 Kan. 262, 1 Pac. 626, the court, speaking through Judge Brewer said:

"The whole philosophy of the doctrine of *res adjudicata* is summed up in the simple statement that a matter once decided is finally decided,"

and that if it appears that a judgment upon the merits was in fact rendered, it is conclusive in a subsequent action where the subject-matter and the parties are the same. The judgment furnishes indisputable affirmative evidence that it is a judgment upon the merits. It recites that, the plaintiffs having presented their evidence and closed their case, the defendants "moved the court that the cause be dismissed for lack of equity, and the court having heard said motion and being fully advised, granted the same." *State ex rel. Jensen v. Bell*, 34 Wash. 185, 75 Pac. 641, is exactly in point. In that case there was a variance between the clerk's entry and the later judgment entered by the court. Speaking to the effect of the variance, the court said:

"The question presented is whether the brief minute entry of the clerk shall be held to be of higher character, as evidence of the court's actual order in the premises, than the written order which was later signed by the judge. We think it should not be so held. A formal written order is signed by a judge, presumably after deliberation and mature reflection upon the matters involved. Such an entry, we think, should be accorded greater weight, and should be received as more solemn evidence of the court's real intention, than a mere minute entry which may be hastily made, and the true import of which may be overlooked by the judge."

See, also, *Newell v. Young*, 59 Wash. 286, 109 Pac. 801.

As we said in *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119:

"The moving parties were before the court demanding relief, the court had full and complete jurisdiction of the subject-matter and the parties, and its decision is final until reversed, or set aside in some appropriate proceeding authorized by law."

It is the final judgment entered in a cause which speaks the court's determination. The decree in the case at bar leaves no doubt in the mind as to the precise question determined. It is that there was no equity in the plaintiffs' case. The issue in both cases was the same, viz., which of the parties had title to the premises. The whole battle revolved about that issue. Many courts of the highest learning have expressed the view that the dismissal of a bill in equity, where there is nothing in the judgment indicating the contrary intention, will be presumed to have been upon the merits, and that it will constitute a bar to further litigation of the same subject-matter between the same parties. We are not called upon to carry the doctrine to that extent in this case, as the judgment itself clearly speaks the ground upon which it was entered. As was said by Judge Hadley in the *Jensen* case, the earlier recitals in the record will not be permitted to contradict the final judgment.

The judgment is affirmed.

RUDKIN, C. J., PARKER, MOUNT, and FULLERTON, JJ.,
concur.

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[No. 9012. Department One. November 15, 1910.]

R. E. HUNTER, *Respondent*, v. THE CITY OF MONTESANO,
Appellant.¹

MUNICIPAL CORPORATIONS—STREETS — PEDESTRIANS — CONTRIBUTORY NEGLIGENCE. A pedestrian crossing on a dark night a street which he knows was closed to travel and which was properly barricaded, giving no heed to numerous barriers which were a plain warning of the dangers, is guilty of gross contributory negligence, and cannot recover for injuries sustained in falling over a barrier.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered May 20, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian through an obstruction in a street. Reversed.

Bridges & Bruener and John P. Hartmann, for appellant.

W. H. Abel, for respondent.

GOSE, J.—The plaintiff seeks to recover damages for an injury sustained in falling over an obstruction in one of the defendant's streets. From a verdict and judgment in his favor, the defendant has appealed.

At the time of the accident, the appellant had been engaged for two or three months in paving Main street, its principal thoroughfare, between Broad street and Pioneer street. Main street runs north and south. Broad street, D street, and Pioneer street run east and west. D street lies between Broad street and Pioneer street. The accident occurred upon a dark, rainy, windy night. The respondent had been driving team for some time, for a liveryman whose place of business was on the west side of Main street about midway between Broad and D streets. Just before the accident, he left the livery barn, traveled south on the sidewalk to the intersection of Main and D streets; thence crossed

¹Reported in 111 Pac. 571.

Main street on the north line of D street; thence north along the sidewalk to the post office, about midway between D street and Broad street; thence south upon the sidewalk to the south side of D street; thence diagonally across Main street toward a cigar store on the west side of Main street, intending to go from that place to his home, which was about two blocks southwesterly therefrom. At a point in Main street about thirty feet south of D street, he ran against a plank, one end of which rested upon a nail keg, the other upon brick or rubbish, fell to the ground, and received the injury of which he complains.

The respondent was fifty-eight years of age, the night was dark, it was raining, the wind was blowing, his eyesight was bad, the rain was beating against his glasses, and he was looking at the lights in the cigar store when he encountered the obstacle which caused his injury. He testified that the street was not in a condition to be traveled by teams; that it contained piles of brick, gravel, and other material; that teams were taken out of the rear of the barn; that the street was "all torn up there;" that he saw the barrier on the south side of D street as he passed it; that it extended across Main street from curbing to curbing, and that he knew of a like barrier across Main street at the north side of Pioneer street. There was a large arc light about the center of D and Main streets, and another about the center of Pioneer and Main streets, which he says was not burning brightly, but was flickering, and the buildings upon Main street were lighted. A part of the sidewalk had been taken up, and he testified that the sidewalk area was rough and muddy. There was no barrier across the sidewalk area. People had been in the habit of crossing Main street. There is no evidence that the course he followed in going to the post office was dangerous.

It is apparent, not only that Main street outside of the sidewalk area was properly barricaded, but that the respondent saw the barriers and knew the condition of the street. He

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said that it was not safe for travel with teams. If it was not safe for teams in the daytime, it is obvious that it was dangerous for a footman in the nighttime. Moreover, it appears that he was walking in reckless disregard of the unsafe condition of the streets. He was looking at the lights in the cigar store, as he said, to see where he was "coming out at," and giving no heed to the danger signals which were upon every side. Barriers are danger signals. They serve no other purpose. Where a traveler is injured upon a street which he knows is closed to travel or being improved, he cannot raise the question of a sufficient barrier. There can, it seems to us, be but one conclusion upon the respondent's evidence; that is, that he was guilty of the grossest negligence.

The duty of a city to keep its streets in good repair necessarily carries with it the right to close the street and suspend travel while repairs and improvements are being made. *Southwell v. Detroit*, 74 Mich. 438, 42 N. W. 118; *Jones v. Collins*, 177 Mass. 444, 59 N. E. 64.

In *Compton v. Inhabitants of Town of Revere*, 179 Mass. 413, 60 N. E. 931, it was held that one who entered upon the street, which he knew was being repaired and which he knew contained frozen piles of earth, although there were no barriers, was guilty of such negligence as precluded a recovery for the injuries he sustained. The court truly said that the object of a barrier is to give warning of danger in using the street, but that where the condition of the street itself is a danger signal, the necessity of a barrier is removed. It was further said that the fact that certain persons had traveled the street and taken the risk did not change the rule, and that "there are always persons who take risks, if a short cut can be made, and who will go over a street even if it is obviously not open to public travel." In *Tagge v. Roslyn*, 51 Wash. 258, 98 Pac. 668, a suit to recover damages for personal injuries caused by falling into an excavation extending across a sidewalk, a barrier had been erected by placing a

board across the sidewalk three or four feet above the walk, nailed to a building on the inner side of the walk and to a post at the outer side. Beneath the board a piece of two by twelve plank, about four feet in length, was laid against the house on one side, a similar plank was laid against the post at the other side, and a third plank was laid horizontally across the two. The barrier was put up by the employees of the city when they quit work on the evening of the accident. They were in place between the hours of nine and ten o'clock at night. The plaintiff fell into the excavation about two hours later. There was evidence that he did not see the barrier. It was ruled, as a question of law, that the barriers were sufficient to relieve the city from liability. The same principle is announced in *Welsh v. Lansing*, 111 Mich. 589, 70 N. W. 129.

In *Jones v. Collins*, *supra*, barriers across each end of the street that was being improved, and across each end of the streets leading into it, were held to suspend the right to travel upon the street, and to relieve the contractor from liability for damages resulting to a footman traveling the street. The barriers did not extend across the entire street. There was sufficient space at the side so that footmen could pass around. The court said:

“But the obstructions and signs were so placed and so numerous and of such a nature as to be well calculated to give ample notice to the public that the street was in process of construction and was not open for travel.”

In *Lineburg v. St. Paul*, 71 Minn. 245, 73 N. W. 723, it was said that there is no duty upon the city to maintain a barrier so high and so close that children cannot find ways or means to pass through and over it. See, also, *Hamilton v. Detroit*, 105 Mich. 514, 63 N. W. 511, and *Walker v. Ann Arbor*, 111 Mich. 1, 69 N. W. 87. The principle which may be deduced from all the cases is that a city is not required to so barricade a street as to preclude injury. It

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discharges the full measure of its duty where it gives a plain warning that there is danger in traveling a street.

The respondent contends that, because there were no barriers along the outer edge of the sidewalk connecting with the cross barriers, the question of negligence is one of fact for the jury. In support of his contention he cites and relies upon *Drake v. Seattle*, 30 Wash. 81, 70 Pac. 231, 94 Am. St. 844; *Peterson v. Seattle*, 40 Wash. 33, 82 Pac. 140; *Reed v. Spokane*, 21 Wash. 218, 57 Pac. 803; *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831; *Stock v. Tacoma*, 53 Wash. 226, 101 Pac. 830, and *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122. In the *Drake* case the excavation, into which the plaintiff fell and of which he had no knowledge, had no lights or barriers to mark its presence. In the *Peterson* case the city had left depressions and obstructions in the street which it was improving, without barriers or other warning of their presence. In the *Reed* case the ground under a cross walk which was extensively traveled by pedestrians had been excavated, the walk being cut so that it was suspended over the excavation. There were no lights or barriers at this point. The court said that the testimony was conflicting as to the amount of light afforded by the street lights at the point where the injury occurred, and that the question of whether the plaintiff was guilty of contributory negligence was, under the circumstances, one of fact for the jury. In the *Sutton* case the barriers had been removed. The city itself had not put up any safeguards, nor had it required others to do so. A third party had placed a loose plank across the sidewalk, one end of which rested upon a lime barrel, and the other was supported by a board fastened to a post near the outer edge of the walk. Upon these facts, the court said:

"If that was an adequate protection, under the then existing circumstances, the city is not liable for any injuries resulting from its removal by some unauthorized person and

occurring before it could, by the exercise of reasonable diligence, discover its displacement. But whether this board, which was without any permanent or substantial fastening whatever and was liable to be thrown down at any moment by the mere carelessness or thoughtlessness of persons passing along the sidewalk, was, at any time, a sufficient protection to the public, was a question for the jury to decide."

In the *Archibald* case the deceased lost his life by the overturning of a wagon upon a fill in the public highway, four or five feet in height and seven or eight feet in width at the top. The court said:

"He had no choice of routes. He was compelled to pass over the highway, leave his load behind, or remain away over night. Under such circumstances, we think the negligence of the deceased, or what a reasonably careful and prudent person would have done under the circumstances, was peculiarly a question for the jury."

In the *Stock* case it was held to be within the province of the jury to determine whether one was guilty of negligence, who fell from an unguarded elevated sidewalk traveled by the public generally, upon a dark night, when she knew there was no barrier. In the *Einseidler* case it was held that it was not negligence *per se* to drive over a bridge that was generally traveled and which had no side rails or barriers, where there was no convenient method of going around it. Cases cited by the respondent from other jurisdictions are upon facts so variant from the facts in the case at bar that a review of them would not be profitable.

We conclude, upon the respondent's evidence, that the city had discharged its full duty, and that his injury resulted from his own negligence. He could have returned to the west side of Main street at the point where he had crossed it in safety a few minutes before the accident. His home was but a few blocks distant. He chose the shorter route, knowing both that it was barricaded and that it was dangerous.

The appellant's motion for a directed verdict should have

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been granted. The judgment is reversed, with directions to dismiss.

RUDKIN, C. J., PARKER, and MOUNT, JJ., concur.

[No. 9164. Department One. November 15, 1910.]

LOUISE L. BIGGS *et al.*, Respondents, v. DAVID M. HOFFMAN
et al., Appellants.¹

VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE—BURDEN OF PROOF. A purchaser of lots with actual notice of a lien thereon has the burden of proving that one of his predecessors in interest was a *bona fide* purchaser without notice, if he would free the lots of the lien.

APPEAL—HARMLESS ERROR—PARTIES AFFECTED. Error in ruling as to which one of the plaintiffs was the owner of a lien sought to be foreclosed cannot be assigned upon an appeal by the defendants.

LIS PENDENS—EFFECT ON PRIOR LIENS—MORTGAGES—FORECLOSURE. A *lis pendens* in a mortgage foreclosure suit does not affect a party-wall lien prior to the mortgage, the owners of the lien not being made parties to the mortgage foreclosure.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 27, 1910. upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to foreclose a party-wall lien. Affirmed.

Theo. D. Powell, for appellants.

C. M. Riddell and Boyle, Warburton & Brockway, for respondents.

GOSE, J.—This is an action to foreclose a lien created by a party-wall contract. On April 12, 1889, Samuel Isaacs, Gertrude, his wife, and Alexander and Morris Isaacs, were the owners of lot 23 in block 1104 in the city of Tacoma, and the Tacoma Land Company was owner of the adjoining lot 22.

¹Reported in 111 Pac. 576.

On that day the respective owners of the two lots entered into a party-wall contract, which provided that the Isaacs should erect a party wall, one-half of which should rest upon each of said lots; that they should keep a true account of the cost thereof and that, when the land company or its legal representatives or assigns should use the wall or any part of it, it or they should first pay to the Isaacs one-half of the cost thereof; that the contract should be construed to create in favor of the Isaacs a lien upon lot 22 for one-half of the cost of the wall, and that the benefits and burdens of the contract should annex to and run with the land, and should be binding upon the heirs, legal representatives, and assigns of the respective parties. This contract was properly acknowledged, and will hereafter be referred to, as "the contract."

On the day following, the contract was entered in an index called "Index to Deeds," and was recorded in Deed Records, but was not entered in the mortgage index or recorded in the "Mortgage Records." Later, Samuel Isaacs and wife conveyed their interest in lot 23 to Alexander and Morris Isaacs, without reference to the contract. Thereafter Alexander and Morris Isaacs assigned a one-half interest in the contract to the respondent Williams. At a later date, Alexander and Morris Isaacs conveyed lot 23 to the respondents Biggs. The deed specifically assigned all the right, title, and interest of the grantors in the "party wall" and "in and to any and all contracts . . . respecting said party wall." After the execution, filing, and recording of the contract as heretofore stated, the Tacoma Land Company mortgaged lot 22 to the Provident Life & Trust Company, the mortgage being duly recorded. In default of payment, the mortgage was foreclosed, the property sold to the mortgagee, the certificate of sale assigned to the Tacoma Land & Improvement Company to which a sheriff's deed was executed and delivered, and the deed was duly recorded. Later one George L. Dick-

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son purchased the property from the sheriff's grantee, and conveyed it to the appellants.

At the time the contract was filed for record, the county auditor of Pierce county kept two indexes, one for deeds and instruments affecting the title to real property, and the other for mortgages and other instruments creating liens against real property. Prior to January 14, 1895, no one general index affecting real estate was kept by the auditor of Pierce county. The respondent Williams intervened in the action, claiming a one-half interest in whatever sum was due under the contract. Samuel Isaacs and wife also intervened, claiming that their deed did not transfer their interest in the contract. The trial court held that their deed passed their interest in the contract, and they have not appealed. It is admitted that the appellants have constructed a four-story building on lot 22 and used the party wall as one of its sides. A decree was entered, giving to the plaintiffs Biggs a lien for one-half of the cost of the party wall, and to the respondent Williams the remainder. The defendants have appealed.

The complaint alleges that the appellants, by "mesne conveyances, . . . became the owners in fee of said lot 22, . . . subject to the lien of paying for the said party wall according to the terms of said party-wall agreement, and the said defendants became the owners of said property with full knowledge of the existence of said party-wall agreement and of all its covenants and conditions." The answer states that "these defendants admit that they became the owners of said lot with knowledge of the existence of said alleged agreement and of its covenants and conditions." Similar allegations and admissions are contained in the complaint in intervention of the respondent Williams and the appellants' answer to the same. The record is silent as to whether any of the appellants' grantors had *actual* notice of the contract. Upon the facts admitted by the answer, the respondents contend that the burden was upon the appellants to prove that

some one of their predecessors in title was a *bona fide* purchaser, without notice of the contract. We think this view is sound. The appellants having purchased the property with actual notice, the property is liable for the payment of the lien, unless they can show that the property was freed from the lien by want of notice to some predecessor in title. It is elementary that a purchaser without notice of a lien can convey the property free from the lien to one who has notice. Natural justice demands that the appellants should either discharge the lien, or produce facts sufficient in law to relieve the property from the obligation. If there was no admission of actual notice to the present owner of the lot charged with the lien, the burden would, no doubt, be upon the respondents to show that the appellants and each of their grantors had actual notice. We think, however, upon the admitted facts, the burden shifts to the appellants to prove the excusatory facts.

This view is not only, as we think, sound in principle, but finds support in the decided cases. In *Griffith v. Griffith*, 9 Paige 315, Chancellor Walworth, in discussing the precise question, said:

“His Honor, however, based his decision, in favor of the respondents, upon the ground that Henderson, from whom they purchased, was a previous *bona fide* purchaser without notice. The answer of the respondents, I think, was sufficient to set up this defense of a *bona fide* purchase by their grantor. It is well settled that a defendant who is himself chargeable with actual or constructive notice of the complainant's equitable claim, at the time of his own purchase of the premises, may nevertheless protect his title by showing that his grantor was a *bona fide* purchaser without notice.”

In *Dey v. Dunham*, 2 Johns. Ch. 182, Chancellor Kent, speaking of the principle upon which a purchaser with actual notice takes subject to the rights of one claiming under an unrecorded instrument, said:

“The ground of the numerous decisions on this subject

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seems to be, the actual fraud of the party in taking a second conveyance with knowledge of the first, and with intent to defeat it."

The same view is announced in *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167. So, in this case, the taking of the deed with actual notice was *prima facie* a fraud upon the rights of the respondents, and in the absence of excusatory facts, is conclusive upon the appellants. When the appellants purchased they either had, or did not have, knowledge that some one of their grantors was an innocent purchaser. The appellants further urge that *Hawkes v. Hoffman*, 56 Wash. 120, 105 Pac. 156, is conclusive in their favor. In that case it was conceded that one of the grantees in the chain of title had no notice.

The view we have taken of the question of actual notice makes it unnecessary to determine whether the recording acts have been complied with so as to make the contract impart constructive notice. That question may become one of great importance, and is not necessarily involved in this case.

The appellants next contend that the court erred in holding that the interest of Samuel Isaacs and wife in the contract passed by their deed to their grantees. The court followed the rule announced by this court upon the same facts, in *Hoffman v. Dickson*, 47 Wash. 431, 92 Pac. 272, 93 Pac. 523, 125 Am. St. 907. Moreover, if, as the court decreed, the Isaacs had no interest in the contract, the respondents are the entire owners, and the appellants are not injured. As we have seen, the Isaacs have not appealed.

The contention that the filing of a *lis pendens* in the foreclosure proceeding removed the lien created by the contract cannot be upheld. The respondents were not parties to the foreclosure suit. As we have pointed out, there is no evidence as to whether the mortgagee had notice of the contract, and what we have said as to the duty of the appellants

to meet the equity of which they knew, or show their excuse for not meeting it, disposes of this contention.

The decree is affirmed.

RUDKIN, C. J., PARKER, MOUNT, and FULLETON, JJ., concur.

[No. 8990. Department Two. November 15, 1910.]

J. C. ZONIG, *Appellant*, v. OSCEOLA BOEHME, *Executrix etc.*,
Respondent.¹

EXECUTORS AND ADMINISTRATORS—CLAIMS—PAYMENT—EVIDENCE—SUFFICIENCY. In an action to establish a claim against the estate of a deceased partner, there is sufficient evidence of payment of an account stated between the partners, where, on statement of the account, the deceased agreed to leave a check for the amount with an attorney, there was evidence that the parties shortly after met and discussed or passed a check, and the widow of the deceased testified that the plaintiff called on the deceased a few days later claiming he had not been paid sufficient money, when they went over their books again and agreed that the previous settlement was correct; especially in view of a delay of two years and failure to commence suit during the lifetime of the deceased.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 2, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action upon an account stated. Affirmed.

Marion A. Butler, for appellant.

Jay C. Allen, for respondent.

RUDKIN, C. J.—Between the 1st day of September, 1901, and the 4th day of January, 1904, the plaintiff, Zonig, and one Dennis Adolph Boehme, since deceased, were copartners under the firm name and style of D. A. Boehme, and were engaged in business as importers, packers, and dealers in leaf tobacco, and manufacturers of cigars, in the city of Se-

¹Reported in 111 Pac. 566.

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attle. On the last named date, the two partners had a full accounting of the partnership business, and the sum of \$1,386.50 was found due from Boehme to the plaintiff. Upon the statement of their account, Boehme promised to leave a check for this balance with a Mr. Wray, who had acted as attorney for the parties during the previous year, on the following morning. Two weeks or a month thereafter Boehme and wife left the state and did not return until the month of April, 1906. After their return they lived at O'Brien, in King county, until the death of the husband in February, 1908. After his death, the above claim was presented to the executrix of his estate, and was disallowed. The present action was thereupon instituted to establish the amount of the claim against the estate. Trial was had before the court without a jury, and from a judgment in favor of the defendant, the plaintiff has appealed.

The sole issue in the case was that of payment, as we think the original indebtedness was clearly established. One of the parties to the transaction is dead, and on grounds of public policy, the statute has sealed the lips of the other, so that the testimony on the issue of payment is unsatisfactory. The parties were compelled to resort to testimony more or less circumstantial in its nature to establish their respective claims, but from the testimony adduced we think the court was warranted in resolving the issue of payment in favor of the respondent. While it satisfactorily appears that the check was not left with Mr. Wray as agreed upon, the only reason assigned for making payment in that way was because of the fact that the appellant was about to leave the city, and if, as a matter of fact, the parties met in person at a later date, the fact that the check was not left with Mr. Wray is of little moment. There was competent evidence tending to show that the parties did so meet. One of the witnesses for the appellant testified that he saw the parties together at or about this time, and heard some conversation in relation to a check, if, indeed, he did not see a check pass from the one

to the other. The wife of the deceased testified that the appellant called at their home in the city of Seattle several days after the check was to be delivered to Mr. Wray, and stated to her husband that he had not been paid sufficient money. The parties again went over their books and agreed that the previous settlement was correct in every particular. When we consider these facts and the long delay in the prosecution of the claim, which was by no means excusable, we think the findings of the court below are justified by the evidence, and its judgment is accordingly affirmed.

DUNBAR, CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9041. Department Two. November 15, 1910.]

PACIFIC IRON WORKS, *Respondent*, v. BRYANT LUMBER & SHINGLE MILL COMPANY, *Appellant*.¹

PUBLIC LANDS—SHORE LANDS—PREFERENCE RIGHT TO PURCHASE—VALUABLE IMPROVEMENTS. The owner of a foundry is not entitled to a preference right to purchase shore lands as the owner of "valuable improvements" prior to March 26th, 1890, pursuant to Rem. & Bal. Code, §§ 6750, 6754, by reason of the erection of an "office building" constructed by one man in two or three days, and a coke shed of the capacity of one-half ton, the latter probably erected after March 26th, and the former at some indefinite time after December 24th, 1889, the value of the buildings not being shown; especially in view of the fact that the state had asserted its title to all tide lands November 11, 1889.

DEEDS—GRANTS—EASEMENTS—RIGHT OF WAY. A right of way deed releasing and forever quitclaiming a strip for railway purposes, to revert to the grantors if ceased to be used for such purposes, grants an easement only, although some language in the granting and habendum clause is appropriate to convey the fee.

PUBLIC LANDS—SHORE LANDS—PREFERENCE RIGHT TO PURCHASE—RIGHTS OF ABUTTERS—CONVEYANCE OF EASEMENT. The grant of an easement for a railway right of way along a shore line extending to or below high water mark does not convey or affect the grantor's preference right to purchase shore lands from the state as the owner of abutting uplands, under Rem. & Bal. Code, §§ 6750, 6754.

¹Reported in 111 Pac. 578.

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Appeal from a judgment of the superior court for King county, Kauffman, J., entered June 30, 1910, upon findings in favor of the plaintiff, upon an appeal from a decision of the state board of land commissioners, in a contest over the preference right to purchase shore lands. Reversed.

Roberts, Battle, Hulbert & Tennant and J. L. Corrigan,
for appellant.

James Kiefer, for respondent.

RUDKIN, C. J.—This is an appeal from a judgment of the superior court of King county, reversing a decision of the board of state land commissioners, which awarded to the appellant the preference right to purchase certain shore lands of the first class on Lake Union. By §§ 6750 and 6754, Rem. & Bal. Code, the preference right to purchase tide and shore lands of the first class is granted, for a limited period, to the following persons, and in the following order: First, to the owners of valuable improvements in actual use, prior to the 26th day of March, 1890, for commerce, trade, residence or business; second, to *bona fide* purchasers from the abutting upland owners; and third, to the abutting upland owners. The respondent claims the preference right solely as an improver of the shore lands, while the appellant claims as an improver, an upland owner, and as a *bona fide* purchaser from the upland owner.

In view of the singleness of its claim, we will first consider the case presented by the respondent. The facts, in brief, are as follows: Some time prior to the 24th day of December, 1889, Goddard Brothers, the predecessors in interest of the respondent, Pacific Iron Works, purchased lots 10 and 11 of Denny & Hoyt's Supplemental plat to the city of Seattle, and constructed a foundry and machine shops thereon. At or about the same time, one Mary A. F. Phillips, predecessor in interest of the appellant, Bryant Lumber & Shingle Mill Company, purchased lots 8 and 9 of the same plat, and

soon thereafter she, or her successor in interest, the Freemont Manufacturing Company, built a wharf and constructed a three-story sash and door factory thereon. The sash and door factory was destroyed by fire on the 24th day of December, 1889, and whatever rights Goddard Brothers acquired as improvers were so acquired between that date and the 26th day of March, 1890, a period of about three months. The testimony is very meager and indefinite as to the extent or character of the improvements made by Goddard Brothers, or as to the time when they were made, and there is an entire lack of testimony as to the value of any such improvements. The fire which destroyed the sash and door factory established by the Freemont Manufacturing Company on lots 8 and 9 left the piling, and a part of the covering on which the superstructure was erected, intact. Some time after the fire, but whether prior to March 26, 1890, is extremely doubtful, Goddard Brothers built what is called an office building on this piling or platform. There is no description of the building in the record except such as the name might indicate, and no testimony whatever as to its value. It does appear, however, that it took one of the Goddards two or three days to construct the building. A coke shed was likewise constructed, partly on these lots and partly on an adjacent railroad right of way. This was, in all probability, after March 26, 1890. The testimony is equally indefinite as to the character of this building, aside from the fact that it was an open shed capable of holding about a half ton of coke. Its value it not shown. These two structures are the sum total of the improvements upon which the respondent bases its preference right to purchase, and we have no hesitation in declaring that Goddard Brothers were not the owners of valuable improvements on these lots in actual use for commerce, trade, residence or business, on or at any time prior to March 26, 1890, within the meaning of the law. *Globe Mill Co. v. Bellingham Bay Imp. Co.*, 10 Wash. 458, 38 Pac. 1112; *Barlow v. Gamwell*, 12 Wash. 651, 42 Pac. 115.

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By section 1 of article 17 of the state constitution, which became operative November 11, 1889, the state asserted its title to all tide and shore lands, and the Goddards were aware of this, both as a matter of law and as a matter of fact. It is highly improbable that they would thereafter construct improvements of any considerable value on state property, and an examination of the record convinces us that they did not. The judgment of the court below must therefore be reversed, in so far as it awards the preference right of purchase to the respondent.

We will next consider the basis of the appellant's claim. Whether it acquired a preference right by reason of the improvements which were destroyed by fire on December 24, 1889, we deem it unnecessary to inquire, nor will we inquire whether any part of lots 8 and 9 is upland as claimed. This leaves only the question of its rights as a purchaser from the abutting upland owner. The predecessor in interest of the appellant was confessedly a purchaser in good faith from the upland owners, unless her grantors ceased to be upland owners prior to the date of the conveyance under which the appellant claims, by reason of a grant of a right of way to the Seattle Lake Shore & Eastern Railway Company. The facts in relation to this latter grant are as follows: On the 6th day of September, 1887, Thomas Burke and wife, owners of the abutting upland, conveyed a right of way to the Seattle Lake Shore & Eastern Railway Company along the shore of Lake Union. Immediately in front of the lots in question, the right of way extended to or below the line of ordinary high water in the lake. The right of way deed remised, released, and forever quitclaimed to the company, a right of way 100 feet in width "to have and to hold the said premises with the appurtenances unto the said party of the second part and to its successors and assigns forever, *for railway purposes, but if it should cease to be used for a railway the said premises shall revert to said grantors, their heirs, executors, administrators or assigns.*" If this were a

grant in fee simple, it would, perhaps, have the effect claimed for it by the respondent, but, in our opinion, it was not.

While some of the language contained in the deed might imply such a grant, when the instrument is construed as a whole and in the light of the purpose for which the grant was made, it is a grant of a right of way or easement and nothing more.

"The grant of a right of way to a railroad company is the grant of an easement merely and the fee of the soil remains in the grantor. Although the language used in the granting part of the deed and in the *habendum* is appropriate, and that commonly used to convey the fee, yet the clause descriptive of the use to be made of the land may so limit or qualify the grant as to change it from a fee to an easement." 14 Cyc. 1162; *Robinson v. Missisquoi R. Co.*, 59 Vt. 426, 10 Atl. 522.

Such being the nature of the grant, it neither conferred a preference right to purchase the adjacent shore lands on the grantee, nor deprived the grantors of their rights as upland owners. *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988, and cases cited.

We are therefore of opinion that the appellant has the preference right to purchase the shore lands in question as a *bona fide* purchaser from the abutting upland owners, and the judgment of the court below is accordingly reversed, with directions to enter judgment affirming the decision of the board of state land commissioners.

DUNBAR, CROW, MORRIS, and CHADWICK, JJ., concur.

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Opinion Per RUDKIN, C. J.

[No. 9112. Department Two. November 15, 1910.]

F. J. BART, Plaintiff v. PIERCE COUNTY, Defendant.¹

INTOXICATING LIQUORS—LICENSE—RECOVERY OF FEE—LIABILITY OF COUNTY—INCORPORATION OF TOWN. The unearned portion of a county liquor license can be recovered by the licensee when his license has become inoperative by reason of the incorporation as a town of the territory in which his saloon was conducted, where the same has not passed beyond the county's control.

SAME—DEFENSES—COUNTY FUNDS—ACTIONS—MULTIPLICITY OF SUITS. A county cannot escape repayment of the unearned portion of a liquor license, which has become inoperative, by the fact that the same has been transferred to the county school fund, and transferred to the school districts; since the school fund is a continuing fund under the control of the county, and the rule against a multiplicity of suits forbids separate actions against each school district, as such course is not necessary

Cross-appeals from a judgment of the superior court for Pierce county, Shackleford, J., entered April 26, 1910, in favor of the defendant, upon an agreed statement of facts, in an action to recover the unearned portion of a liquor license fee. Reversed on plaintiff's appeal.

Burkey, O'Brien & Burkey, for plaintiff.

J. L. McMurray and F. D. Oakley, for defendant.

RUDKIN, C. J.—On the 28th day of April, 1909, the board of county commissioners of Pierce county granted a license to the plaintiff to sell spirituous, fermented, malt, and other intoxicating liquors, on certain premises in the town of Wilkeson in said county, particularly designated and described on the face of the license, for the term of one year from that date. On the 12th day of July, 1909, the town of Wilkeson became incorporated as a town of the fourth class, under the general laws of the state, and thereafter passed an ordinance providing for the regulation and sale of intoxicating liquors within its corporate limits. On the 1st day of October,

¹Reported in 111 Pac. 582.

1909, the plaintiff was compelled to take out a town license pursuant to this ordinance, and thereafter presented his claim to the board of county commissioners for the unearned portion of the county license fee. The claim was rejected by the board, and this action was thereupon instituted within the time limited by law. The court below held that the plaintiff was entitled to recover the 55 per cent of the unearned license fee which was paid into the general fund of the county, but denied a recovery of the residue, and from this judgment, both parties have appealed, and will be designated as in the court below.

It is conceded that the county license became inoperative upon the incorporation of the town of Wilkeson, and we will assume that such was the case, without expressing any opinion upon that question. The question for decision on this appeal is thus stated in the county's brief: "Can a licensee recover from a county, for the unexpired portion of a year, the unearned proportion of a license fee paid said county for a liquor license, where said license was rendered inoperative by reason of the incorporation as a town of the territory in which the saloon was conducted, and said licensee was compelled by the authority of the newly incorporated town to procure a license from it to conduct said saloon business?" This question must be answered in the affirmative. It was so held by this court in *Pearson v. Seattle*, 14 Wash. 438, 44 Pac. 884, and we are satisfied with the rule there announced. True, in that case the license fee was paid to the city, and the license was rendered inoperative by the act of the city, while in this case the license was rendered inoperative by operation of law, rather than by any act of the county, but we do not deem this distinction a material one. In *Allsman v. Oklahoma City*, 21 Okl. 142, 95 Pac. 468, 16 L. R. A. (N. S.) 511, the city license was rendered inoperative by a provision of the constitution of the new state, but the court held that the right of recovery should be sustained, "On the plainest principles of natural justice." See, also, *State ex rel.*

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Johnson v. Cornwell, 12 Neb. 470, 11 N. W. 729; *Lydick v. Korner*, 15 Neb. 500, 20 N. W. 26; *State v. Weber*, 20 Neb. 467, 30 N. W. 531; *Chamberlain v. Tecumseh*, 43 Neb. 221, 61 N. W. 632; *School District etc. v. Thompson*, 51 Neb. 857, 71 N. W. 728; *Hirn v. State*, 1 Ohio St. 15; *Sharp v. Carthage*, 48 Mo. App. 26.

It is said that the rule thus announced is not supported by the weight of authority in other jurisdictions, but it at least finds support in the great principles of natural justice and common honesty by which the conduct of the state and its instrumentalities, as well as the conduct of the individual, should be guided. We are therefore of opinion that the appeal of the county is without merit.

Nor do we think the position of the court below, that the plaintiff is not entitled to recover the 35 per cent of the unearned license fee which was paid into the county school fund, is tenable. The fee was lawfully paid into the county treasury in the first instance, and in so far as it has passed beyond the control of the county authorities in accordance with law, the county is not liable for its return. This is undoubtedly true of the ten per cent of the fee paid over to the state treasurer, and the same is equally true of the portion paid into the county school fund, if, as a matter of law, that portion is now beyond the control of the county authorities. But such, in our opinion, is not the case. All moneys paid into the county treasury are apportioned to different funds as a matter of policy or convenience, such as the county school fund, the road fund, the bridge fund, the salary fund, the general fund, etc., but all these funds are under the control and subject to the dominion of the county, and so long as they remain there it is not without the power of the county to dispose of them as law and justice may require, nor is it beyond the power of the courts to compel such disposition in a proper case. If any part of the unearned portion of this license fee has passed beyond the control of the county authorities and into the custody and control of the several school districts of the county,

an action would lie against each district to recover the sum apportioned to it, for the like reason that an action will lie against the county itself. For where a municipality has obtained the money or property of another without authority of law, it is its duty to refund it; not by reason of any contract or obligation it has entered into, but from the natural obligation to do justice, which binds all persons whether natural or artificial. *Argenti v. San Francisco*, 16 Cal. 255; *Loring v. St. Louis*, 10 Mo. App. 414.

But a court will not require a plaintiff to resort to such a multiplicity of suits, nor will it tolerate such a practice, unless compelled to do so from the necessities of the case, and we do not deem such a course at all necessary here. The county school fund is a continuing one, and rights and obligations against it may properly be enforced, and should be enforced, against its lawful custodian. If a void tax is paid under protest and afterwards apportioned to the different county funds, it cannot be that the taxpayer must resort to each individual fund for restitution, nor that he is entirely without remedy. Such a case does not differ materially from the one now under consideration. *Cooley, Taxation* (2d ed.), p. 807; *Byles v. Golden*, 52 Mich. 612, 18 N. W. 383.

The judgment is therefore reversed, with directions to enter judgment in favor of the plaintiff for 90 per cent of the unearned license fee, with legal interest from the date of the presentation of his claim to the board of county commissioners.

DUNBAR, MORRIS, CROW, and CHADWICK, JJ., concur.

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[No. 9062. Department Two. November 16, 1910.]

MARTHA ANDERSON, *Appellant*, v. T. S. BURGOYNE,
Respondent.¹

HUSBAND AND WIFE—COMMUNITY DEBT—PERSONAL JUDGMENT AGAINST WIFE. In an action upon a note executed by the husband alone, personal judgment against the wife is unauthorized, the plaintiffs being confined to establishing the community character of the indebtedness.

JUDGMENTS—RES JUDICATA—JUDGMENTS NOT FINAL. The denial of a motion to vacate an order sustaining a demurrer in a garnishment proceeding is not final, and is accordingly not *res judicata*.

JUDGMENT—DEFAULT—PRESUMPTIONS—VACATION. A party has a right to presume that the plaintiff will not take a different default judgment than the facts alleged warrant.

JUDGMENTS—VACATION—EQUITABLE RELIEF—LIMITATIONS. Relief against a judgment may be granted in equity after the expiration of one year from the date of its entry, where the parties had no actual notice of the matter complained of until a few days before the action was commenced, nor notice of the facts sufficient to put them on inquiry.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 16, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action to reform a judgment. Reversed.

Peters & Powell, for appellant.

J. W. Langley, Robert D. Hamlin (*F. A. Gilman*, of counsel), for respondent.

RUDKIN, C. J.—On the 17th day of September, 1906, A. M. Anderson, husband of the plaintiff, Martha Anderson, made, executed and delivered to the defendant, Burgoyne, his two promissory notes for the sum of \$925 and \$1,000 respectively, payable on or before March 26, 1907. The

¹Reported in 111 Pac. 777.

notes were not paid at maturity, and on the 30th day of April, 1907, Burgoyne instituted an action in the court below against Anderson and wife to recover the amount of the two notes with accrued interest. The complaint alleged that the husband executed the notes on behalf of himself and wife, that the notes constituted a community obligation of the husband and wife, and prayed for judgment against the husband and wife and each of them. The wife interposed a demurrer to the complaint, which was overruled, and failing to appear or plead further, a joint and several judgment was given by default against both husband and wife on the 2d day of July, 1907. On the 28th day of October, 1907, Burgoyne caused a writ of garnishment to issue on the judgment against certain creditors of the Andersons. On the 19th day of November, 1907, the plaintiff in this action filed her petition in intervention in the garnishment proceeding, wherein she alleged that the property or indebtedness sought to be reached by the garnishment was her separate property. On the 5th day of November, 1908, the intervention was allowed by order of court, and the defendant, Burgoyne, was given ten days to plead thereto. On the 4th day of December, 1908, a demurrer was interposed to the petition in intervention, and on the 12th day of December following, the demurrer was sustained. On the 18th day of December, 1908, the plaintiff herein and her husband moved the court to vacate the last mentioned order sustaining the demurrer, and for a reargument of the cause, which motion was denied on the 19th day of January, 1909.

On the 22d day of January, 1909, the present action was instituted in equity to reform the original judgment, by eliminating therefrom that part which gave a personal judgment against the wife. The court found the foregoing facts, in substance, and found in addition thereto that the attorneys for the plaintiff in the original action did not intend to take a personal judgment against the wife, but only a judgment establishing the community character of the indebtedness, that

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a copy of the judgment was not served on the plaintiff herein or her attorneys, and that they had no notice that a personal judgment had been taken against the wife until shortly before the commencement of this action, except such notice as might be imputed to them or implied from the foregoing facts. The court was of opinion, however, that the order denying the motion to vacate the order sustaining the demurrer to the petition in intervention in the garnishment proceeding was *res adjudicata*, and a bar to the present action, and entered a judgment of dismissal, from which this appeal is prosecuted.

In so far as the equities of the case are concerned, there is little room for controversy. It is not seriously contended on this appeal, nor could it be successfully contended, that the original judgment against the wife was authorized or proper, for in an action on a promissory note executed by the husband alone the utmost relief the plaintiff is entitled to, as against the wife, is a judgment establishing the community character of the indebtedness. *Commercial Bank of Vancouver v. Scott*, 6 Wash. 499, 33 Pac. 829, 34 Pac. 434; *McDonough v. Craig*, 10 Wash. 239, 38 Pac. 1034; *Gund v. Parke*, 15 Wash. 393, 46 Pac. 408; *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736.

Nor was the order or judgment in the garnishment proceeding a bar to the present action. For, waiving the question whether that order involved the merits of the case, it was not final (*Seattle & N. R. Co. v. Bowman*, 46 Wash. 90, 89 Pac. 399), and final judgments alone work an estoppel. *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154; *Freeman*, Judgments (4th ed.), § 251.

The bar of the statute and laches are the only questions remaining for consideration. This court has adopted the general rule that a party may obtain relief in equity against a judgment, after the expiration of a year from the date of its entry, if proper grounds for equitable interposition are shown. *Long v. Eisenbeis*, 18 Wash. 423, 51 Pac. 1061; *State ex rel.*

Boyle v. Superior Court, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. 724; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *State ex rel. Post v. Superior Court*, 31 Wash. 53, 71 Pac. 740.

When a party is sued he has a right to presume that no other or different judgment will be taken against him by default than the facts alleged will warrant, and he may safely rely on that presumption until he has actual or constructive notice to the contrary. We think it clearly appears in this case that neither the appellant nor her attorneys had actual notice of the form or contents of the original judgment against her until a few days before the institution of the present action, nor do we think that she or they had notice of facts sufficient to put one of reasonable prudence upon inquiry. The judgment of the court below is therefore reversed, with directions to enter judgment in favor of the appellant in accordance with the prayer of her complaint.

CHADWICK, MORRIS, CROW, and DUNBAR, JJ., concur.

[No. 9203. Department Two. November 17, 1910.]

ROBERTSON MORTGAGE COMPANY, *Respondent*, v. W. H. B. THOMAS *et al.*, *Appellants*.¹

APPEARANCE—WHAT CONSTITUTES—STIPULATIONS. A stipulation by defendants allowing the amendment of the complaint is a general appearance.

APPEAL—NOTICE—SERVICE ON CO-PARTIES—APPEARANCE—NOTICE. Defendants joining in a stipulation by all the defendants cannot urge ignorance of the appearance of other defendants as an excuse for failing to serve notice of appeal upon all the appearing defendants.

APPEAL—NOTICE—SERVICE ON CO-PARTIES—DEFAULTING DEFENDANTS. Defendants in a mortgage foreclosure, alleged to have an interest in the premises, and who appeared by a stipulation and defaulted,

¹Reported in 111 Pac. 795.

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are necessary parties to an appeal by co-defendants, under Rem. & Bal. Code, § 1720, and if not served the appeal will be dismissed; since they could, although in default, raise jurisdictional questions in the appellate court, and are presumed to be affected by the appeal.

Motion to dismiss an appeal from a judgment of the superior court for King county, Neal, J., entered March 12, 1910, in favor of the plaintiff, in an action to foreclose a mortgage. Granted.

Shepard & Flett and Brady & Rummens, for appellants.

John T. Mulligan and E. W. Howell, for respondent.

DUNBAR, J.—This is a motion to dismiss an appeal for the reason, among others, that none of the appellants have served, or caused to be served, any notice of appeal upon all the parties or their attorneys of record. The action was to foreclose a mortgage by the Robertson Mortgage Company, against the Magnolia Heights Company, a corporation, L. E. Campbell, Whiton Hardware Company, a corporation, Robert Pettigrew, E. P. Jessup, and Jane Doe Jessup, his wife, Edward Connor and Mary Doe Connor, his wife, W. H. B. Thomas and Jane Doe Thomas, his wife, and the Westmoreland Company, a corporation. There was a judgment of foreclosure and a judgment barring all the defendants from asserting any claim to the land privileged other than was specified in the judgment. The parties had all appeared. The record shows that Edward Connor, Mary Doe Connor, E. P. Jessup and Jane Doe Jessup, defendants, were not served with notice of appeal, hence this motion to dismiss.

The complaint contained the ordinary allegation that the defendants claimed liens or interest in the said mortgaged property, the exact nature and extent of which to the plaintiff was unknown, but which the plaintiff alleged to be subsequent and subordinate to its interest. An affidavit is filed by attorney for appellants Thomas et al., that he had examined the record and that it did not appear that an appearance had been made by these unserved defendants aforesaid, and that

that was the reason why they were not served. But the court finds in its decree, and also in its findings of fact, that these defendants appeared and that their defaults were entered. There also appears upon the record a stipulation by all the defendants, the unserved defendants appearing by Peters & Powell, their attorneys, and the appellants appearing by their attorneys Shepard & Flett. This stipulation was to the effect that the plaintiff be permitted to amend its complaint by interlineation in the original complaint. It was the duty of the appellants to take notice of this appearance by stipulation as it was a general appearance in the case, and they cannot now urge want of knowledge of which they complain.

It is unnecessary to review all the decisions of this court on the question involved. The authorities were all collated in *Sipes v. Puget Sound Elec. R. Co.*, 50 Wash. 585, 97 Pac. 723, and there it was held that the motion to dismiss, because one Dimmock, who had been a party to the action and who had appeared and defended the action, had not joined in the appeal and had not been served, could not be sustained. The motion to dismiss was on the ground that the court had no jurisdiction, for the reason that the said Dimmock had not been served, and that therein there was a failure to comply with Rem. & Bal. Code, § 1720, which provides that, when the notice of appeal is not given at the time when the judgment or order appealed from is rendered or made, it shall be served upon all parties who have appeared in the action or proceeding. The rule theretofore announced by this court was somewhat modified in this decision, and it was held, in effect, that it was the object of the law to enforce notice of appeal on parties who could appeal or join in an appeal, and whose rights would or might be affected by some action which the appellate court might take; but that, inasmuch as Dimmock could not appeal, for the reason that he had prevailed in the court below and that there was no judgment against him, the motion to dismiss could not prevail. But that is not the case here. Jessup and wife and Connor and wife did not prevail in the ac-

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tion below. On the contrary, they were barred by the judgment of all interest which they might have, and under the allegations of the complaint, some interest is claimed by them. It is true that it might be reasonable to suppose that, not having appeared to urge their defense to this action, they had none. But it will not do to lay down the rule that we will have to investigate the merits of a case to determine the litigant's right of appeal, or to determine what question he might or might not raise on appeal. We can look no further than to determine (1) whether he was a party to the action appearing in the case, and (2) whether he is entitled to an appeal. If these two conditions concur, it must be presumed that he is affected by the judgment; whether wrongfully affected, must be determined on the appeal. A party defendant to an action has a right to rely upon a defense which he may choose to make in the appellate court; and while there are certain defenses of which he might be debarred by not urging them in the trial court, the jurisdiction of the court and the question that the complaint did not state a cause of action against him are always left to him in this court.

The parties, then, having appeared in the action and having a right of appeal, and not having been served with notice of appeal, for reasons stated too many times by this court to need a repetition, the motion to dismiss and affirm will be sustained. This renders unnecessary a discussion of the other questions presented.

RUDKIN, C. J., CHADWICK, CROW, and MORRIS, JJ., concur.

[No. 9068. Department One. November 19, 1910.]

*In the Matter of the Guardianship of MAX LEANDER WELLS,
a Minor.*¹

GUARDIAN AND WARD—JURISDICTION—RESIDENCE. A finding that the residence of a child was at King county, is warranted, where it appears that its mother had been staying there before leaving for New York, intending to return to take up new work there, and left the child there with relatives of the father, although prior thereto she had spent some time with her own parents in Kitsap county.

ADOPTION—REVIEW—DISCRETION. Under Rem. & Bal. Code, § 1698, authorizing an adoption where the court is satisfied of the fitness and propriety thereof, a ruling will not be reviewed except for abuse of discretion.

ADOPTION—DISCRETION—GUARDIAN AND WARD. Upon the hearing of consolidated applications for the adoption of an orphan by relatives of the mother, and for guardianship by relatives of the father, the infant having no estate, it is not an abuse of discretion to deny the adoption and grant the guardianship, where both parties are suitable to have the care of the child.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial will not be granted for newly discovered evidence that is almost wholly cumulative and would not change the result.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 30, 1910, granting a petition for the appointment of guardians, upon findings of the court, in a contest for the custody of a minor. Affirmed.

Douglas, Lane & Douglas, for appellants.

Brady & Rummens, for respondents.

PARKER, J.—This is a controversy over the custody of Max Leander Wells, a minor, now three years old, son of Max Wells and Elsie Priest Wells, both deceased. The father died June 22, 1907, at Portland, Oregon. The mother then came to Seattle to the home of F. Boyd Wells and Mrs. Clarissa Ruelle, brother and sister of the deceased father

¹Reported in 111 Pac. 778.

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and husband, where the child was born July 12, 1907. Thereafter the mother lived part of the time with her sister-in-law, Mrs. Ruelle, and part of the time with her parents, Leander J. Priest and wife, at Kingston, in Kitsap county. She was employed as a teacher or tutor at both Kingston and Seattle at different times. She became interested in the subject of teaching defective children, and went to Rochester, New York, to attend a school to receive training in that work. She left her child with Mrs. Ruelle, at Seattle, expecting to return there to take up her new work. After being at Rochester a short time, she died on October 15, 1909. The child has been in the care and custody of Mrs. Ruelle ever since.

On January 5, 1910, F. Boyd Wells and Mrs. Clarissa Ruelle, filed a petition in the superior court of King county asking to be appointed guardians of the child. On the 11th day of January, 1910, Leander J. Priest and wife, maternal grandparents of the child, filed a petition in the superior court for Kitsap county asking for the adoption of the child. The adoption matter came on for hearing first, when counsel for Mr. Wells and Mrs. Ruelle appeared and objected to the jurisdiction of the court, upon the ground that the child was not a resident of Kitsap county but of King county. The proceeding upon that hearing resulted in counsel agreeing to the court ordering the transfer of the adoption matter to the superior court for King county for trial, on account of the convenience of witnesses, the jurisdiction question not being waived. Thereafter both matters were consolidated by the superior court for King county. Counsel for Mr. and Mrs. Priest objected to the jurisdiction of the superior court for King county to hear the guardianship matter, upon the ground that the child was not a resident of King county but of Kitsap county. Their theory seems to be that the court had jurisdiction of the adoption matter, but only because of the change of venue. The consolidated matters were tried by the court, resulting in the court finding that the child was

a resident of King county, followed by a judgment denying the prayer of the adoption petition, and granting the prayer for the appointment of Mr. Wells and Mrs. Ruelle guardians of the child. From this disposition of the matters, Mr. and Mrs. Priest have appealed to this court.

Learned counsel for appellants first contend that the court was without jurisdiction, because the evidence does not warrant the conclusion that the child was a resident of King county. This, of course, presents only a question of fact. Counsel for both sides proceed upon the assumption that it is to be determined by the domicile of the mother at the time of her death. The evidence is conflicting as to where she considered her domicile was for some time prior to her death. The evidence upon this question is voluminous, and goes into considerable detail relative to her residence covering the period following her husband's death. While the evidence shows that she spent a considerable part of her time with her parents at Kingston prior to the spring and summer of 1909, it seems clear that she had been staying with Mrs. Ruelle at Seattle for some time before going to New York, that she had her child there, and left it there with Mrs. Ruelle with the intention of returning to Seattle to take up her new work. We think the court was warranted in concluding that the residence of the mother and child was in King county. It follows that the court had jurisdiction.

It is next contended that the court erred in appointing respondents guardians and refusing to permit appellants to adopt the child. We are convinced by the evidence that both the appellants and respondents are suitable both morally and financially to properly care for this child. Appellants were asking for adoption of the child, not for his guardianship. The language of § 1698, Rem. & Bal. Code, clearly contemplates that the matter of adoption shall rest in the sound discretion of the court. The order is to be made when the court "shall be satisfied of the fitness and propriety of such adoption." It is possible for the superior court to abuse this

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discretion by denying a prayer for adoption. Such might be the case where a child is illegitimate and is entirely abandoned. And the person seeking the adoption is conceded to be a proper person to rear the child. True, these appellants cannot be said to be unsuited to the rearing of this child, but he is not abandoned to the world or illegitimate, but born in lawful wedlock of eminently respectable parents, whose name he bears. This is a heritage he no doubt will prize in the future. He is entitled to remain, in name, in law, and in the eyes of the world, the son of his natural parents, unless there be weighty reasons for his adoption by others. Who can read the last word of this dying mother to her boy and not see that the bearing by him of the name of that mother and father will always be a sweet remembrance and an influence for good. Upon her deathbed she writes to him this message:

"Darling Little Sonny:

"Before it is too late mother wants to write a letter to you so when you are a man you can read what I want you to be. Whatever you do precious, join a church as soon as you are old enough to understand what it means, and be an earnest Christian so you can come and be with me and father, and lover be good to auntie always. Be my brave little orphan and everything will be all right. Oh, sweetie I do so want my baby. Your loving mother,

"Elsie Wells."

"Keep all the little things of mine dearie for your own wife and children. Have a nice home for auntie Maud, won't you."

Clearly, the learned trial court did not abuse its discretion in denying appellants' petition for adoption.

Since no one but respondents applied for guardianship of the child, and the evidence shows that they are well fitted in every way to assume such guardianship, and manifest a willingness to bear the expense of his proper care, being fully able to do so, he having no estate; we see no reason for interfering with the order of appointment.

Appellants moved for a new trial upon the ground of newly discovered evidence. We find no merit in the motion. The

new evidence claimed to have been discovered is almost wholly cumulative; and besides, we do not think it would change the result even if produced upon a trial.

We conclude that the learned trial court rightly disposed of the matters. Its judgment is affirmed.

RUDKIN, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 8897. Department One. November 21, 1910.]

B. C. BREEDEN *et al.*, *Respondents*, v. SEATTLE, RENTON, & SOUTHERN RAILWAY COMPANY, *Appellant*.¹

CARRIERS—NEGLIGENCE—SETTING DOWN PASSENGERS—EVIDENCE—SUFFICIENCY. The negligence of a street railway company in starting a car while a woman sixty-five years old was alighting at a regular stopping place, is for the jury, where it appears that the conductor knew that she wanted to get off at that place, that he left the car to deliver a mail sack, and on returning quickly, gave the signal to start the car, without noticing that the passengers were getting off.

CARRIERS—ACTIONS—ISSUES AND PROOF—IMMATERIAL VARIANCE. In an action for injuries sustained by a passenger in alighting from a street car, a variance as to the name of the street where the accident occurred is not material where no one was misled and no objection was made to the evidence.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$1,700 for injuries sustained by a woman sixty-five years of age, thrown to the ground by the starting of a street car, is not excessive, where it appears that she was injured internally and severely bruised on the head and hip, resulting in a slight paralysis, and had not fully recovered in eight months.

Appeal from a judgment of the superior court for King county, Gay, J., entered January 27, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger alighting from a street car. Affirmed.

Morris B. Sachs, for appellant.

Charles H. Gray and *Geo. McKay*, for respondents.

¹Reported in 111 Pac. 771.

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PARKER, J.—This is an action to recover damages for personal injuries alleged to have resulted to the plaintiff, Sarah F. Breedon, from the negligence of the defendant while she was a passenger upon one of its cars. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff in the sum of \$1,700. The defendant has appealed.

The evidence was not free from conflict, but there was competent evidence sufficient to warrant the jury in believing the following: The appellant operates an electric railway between Seattle and Renton, Columbia being one of its intermediate stations. On April 20, 1909, Mrs. Breedon boarded one of appellant's cars in Seattle, intending to go to Columbia. The railway is on Rainier Boulevard at Columbia, crossing Edmunds street there, and about three hundred feet further south crossing Ferdinand street. The cars stop at Edmunds street, and also at a point a little north of Ferdinand street, the latter being the principal stopping place for that station. The post office is near the Edmunds street crossing, and when the mail is carried it is there taken from the car to the post office, as it was taken from the car with which we are here concerned.

Upon arriving at Edmunds street, the car stopped and several persons got off, Mrs. Breedon being the last to leave the car. Immediately upon the car stopping, the conductor ran from the front end of the car with the mail sack to the post office, returning quickly to the front end of the car. In the meantime several of the passengers were getting off at the rear end, opposite the post office side. When Mrs. Breedon was in the act of getting off at the rear, the conductor, having arrived upon the front platform, caused the motorman to start the car suddenly. This threw Mrs. Breedon to the ground, causing the injuries for which she seeks damages. The starting of the car while she was in the act of getting off is the negligence relied upon for recovery. Mrs. Breedon is sixty-five years old. The conductor knew she wanted to

get off at Columbia. The conductor claims that he did not see any of the passengers get off while the car was stopped there, and did not know Mrs. Breeden was attempting to get off when he told the motorman to go ahead; but we think the evidence of the surroundings was such as to warrant the jury in concluding that he would have known of her attempt to get off had he been exercising due care.

The principal contention of learned counsel for appellant is that the trial court erred in denying its motion for nonsuit, and in denying its motion for judgment upon its challenge to the sufficiency of the evidence, at the conclusion of all of the evidence. What we have already said relating to the evidence we think shows that the question of negligence on the part of appellant's servant was for the jury. Clearly, it could not be decided as a matter of law. It is equally clear that we cannot say, as a matter of law, that Mrs. Breeden was guilty of contributory negligence.

It is contended that there was a fatal variance between the allegations of the complaint and the proof. It was alleged that the injury occurred at Ferdinand street, while the proof showed it occurred at Edmunds street. The proof showed plainly that the place of the accident was well known to the defendant. All of its witnesses fixed the place of the accident at Edmunds street. Mrs. Breeden fixed it at the same place in her testimony, though she was evidently not very certain as to the name of the street. The variance was only in the name of the street, not in the real place. No one seemed to be uncertain in regard to that. Clearly, the appellant was not misled to its prejudice, and therefore the variance was immaterial, under § 299, Rem. & Bal. Code. No objections were made to the evidence introduced by respondents showing the place of the accident until the question of variance was raised in the motion for nonsuit, and even then the particular variance relied upon was not clearly pointed out. Other variance than that we have noticed was not of sufficient importance to require discussion.

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Syllabus.

It is contended that the verdict is excessive in amount, and was the result of prejudice and passion on the part of the jury. We cannot agree with this contention. There was evidence tending to show that she was injured internally; that she was severely bruised on the side of the head; that her hip was bruised, resulting in a slight paralysis; that there resulted a great deal of tenderness along the spine; that she had been under treatment by her physician continuously since the injury occurred, and had not recovered at the time of the trial, which was about eight months after the injury. Previous to the injury she was in good health.

We find no prejudicial error in the instructions given to the jury; and the requested instructions were given, in substance, so far as appellant was entitled to have them given. We conclude that the judgment should be affirmed. It is so ordered.

RUDKIN, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9010. Department One. November 21, 1910.]

A. G. WORTHINGTON *et al.*, Respondents, v. F. A.

LA VIOLETTE, Appellant.¹

PROCESS—SUMMONS FOR PUBLICATION—SUFFICIENCY. A summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default.

SAME—JUDGMENT—SERVICE OF PROCESS—EVIDENCE. In an action to set aside a default judgment in a tax foreclosure, a finding that there was no summons other than a defective publication shown by the files is warranted where the defendants in the foreclosure were not personally served, the files show no other service than the defective publication, and there was no affirmative showing that any other service was made.

¹Reported in 111 Pac. 784.

TAXATION—PLEADING AND PROOF—AMENDMENTS. Where, in an action to set aside a tax title, the defendant in two amended answers pleaded title and possession in himself, it is not an abuse of discretion, upon sustaining an objection to his deposition showing that he was a married man, to refuse leave to amend the answer to show that the title was in himself and wife as community property.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 16, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to vacate a tax deed and to quiet title. Affirmed.

J. C. Cross (*A. Emerson Cross*, of counsel), for appellant.

J. D. Bauer (*Foster & Worthington*, of counsel), for respondents.

PARKER, J.—This is an action to set aside a tax deed and recover the property therein described. The plaintiffs allege in their complaint their ownership and facts showing want of jurisdiction in the court to render the judgment upon which the tax deed is based. The defendant filed an answer, an amended answer, and a second amended answer, in all of which he denies the allegations of the complaint relating to want of jurisdiction to render the judgment upon which the tax deed is based, alleges in substance that he is in possession of and claims title to the property under the tax deed, and pleads no other right or title to the property, either in himself or any other person. A trial before the court resulted in a judgment in favor of the plaintiffs. The defendant has appealed.

The record in the tax foreclosure case, introduced in evidence upon the trial, fails to show the issuance or service of any summons in that case, other than one that was served by publication only, containing no directions for the defendant's appearance except the following:

"You and each of you are hereby directed and summoned to appear within 60 days after the service of this notice and

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summons upon you, exclusive of the date of service in the above entitled court, and defend the action or pay the amount due together with the costs."

That record also contains the usual affidavit of nonresidence of the defendant. There was evidence tending to show that the owners of the property, at the time of the foreclosure, were never personally served with this summons or other process in that case. The appellant offered no evidence of the issuance or service of any other summons. It is clear that the published summons was void and gave the court no jurisdiction to decree the foreclosure of the taxes, since it was not such a summons as the law requires; and it is equally clear that respondents' evidence made a *prima facie* showing that there was no other summons issued or served in the case. *Pillsbury v. Beresford*, 58 Wash. 656, 109 Pac. 193; *Gould v. White*, 54 Wash. 394, 103 Pac. 460; *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043. And there being no affirmative proof of the issuance or service of any other summons than this void one, the trial court was fully warranted in finding, as it did in substance, that there was no other summons upon which the judgment and tax deed could rest.

At the trial, after respondents had rested, there was read in behalf of appellant his deposition, wherein among other things, he testified that he was married at the time he received the tax deed. This testimony appears to have gone into the deposition over the objections of respondents' counsel. Just what objections were made to it when read to the court at the trial is not clear from the record. However, appellant's counsel immediately moved the court for leave to amend his second amended answer, by alleging that the property was the community property of appellant and his wife. This was objected to by counsel for respondents. The court sustained the objection and denied the motion. Learned counsel for appellant contend that the court erred in denying his motion to amend, and insist that we should now treat the cause as if

this proposed amendment was actually made, in view of the manner in which this marriage relation appeared in the case. They seem to assume that this fact appeared in the evidence without objection from respondents, since the statement of facts does not clearly show that it was objected to at the moment it was read to the court upon the trial. It is clear, however, that the motion to amend was immediately made and objected to. We think the objection in the deposition, and the objection to the motion to amend immediately following the reading of the testimony, shows clearly that the respondents were not consenting to the introduction of evidence tending to show title in any other person than appellant, which was clearly the purpose of the testimony and proposed amendment. In appellant's second amended answer, as well as his two previous answers, he pleaded possession and title in himself alone. His proof could not go beyond that, over respondents' objections, in the absence of a timely amendment to his answer raising such an issue. Rem. & Bal. Code, § 794; *Garvey v. Garvey*, 52 Wash. 516, 101 Pac. 45; *Murray v. Briggs*, 29 Wash. 245, 69 Pac. 765; *Allen v. Higgins*, 9 Wash. 446, 37 Pac. 671, 43 Am. St. 847; *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318. And it is plain that the court did not abuse its discretion in denying appellant's motion for leave to amend at that late day. *Harsin v. Oman*, 59 Wash. 693, 110 Pac. 621; *International Development Co. v. Clemans*, 59 Wash. 398, 109 Pac. 1034.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

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Opinion Per RUDKIN, C. J.

[No. 9015. Department Two. November 21, 1910.]

SHIPWRIGHTS, JOINERS & CALKERS ASSOCIATION, LOCAL
No. 2 OF SEATTLE, *et al.*, Respondents, v.JOHN MCFARLAND MITCHELL *et al.*,*Appellants.*¹

TRADE UNIONS—IDENTITY—CHANGE IN AFFILIATIONS—FUNDS—PROPERTY RIGHTS. The identity of an unincorporated labor association and its property rights are not affected by changes in its affiliations with other labor unions or organizations; and it is a gross breach of trust for its officers to pay over its funds to a rival organization with which it affiliated at one time.

Appeal from a judgment of the superior court for King county, Sheeks, J., entered February 26, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to recover the funds of an association wrongfully withdrawn from a bank. Affirmed.

William C. Keith, for appellants.

L. H. Wheeler and Faben & Kelleran, for respondents.

RUDKIN, C. J.—The Shipwrights, Joiners & Calkers Association was organized in the city of Seattle about 25 years ago. The association is unincorporated, and is composed of numerous craftsmen voluntarily banded together for their mutual benefit and protection, and to provide health and death benefits for members. It is supported wholly by dues collected from members, which have varied from 25 cents to 70 cents per month, per capita, for several years last past. At various times since its organization, the association has affiliated with different labor organizations, such as the American Federation of Labor, the Central Labor Council of Seattle, The International Union of Shipwrights, Calkers & Joiners, and the Pacific Coast Maritime Builders Federation. From 1902 until late in 1906, the association was affiliated with

¹Reported in 111 Pac. 780.

the International Union of Shipwrights, Calkers & Joiners, as Local No. 11, and from the latter date until the present controversy arose, with the Pacific Coast Maritime Builders Federation, as Local No. 2. While the membership in the association is continually changing by deaths, withdrawals, and removals, and while its affiliations with other organizations have changed from time to time, the association itself remains, and has at all times maintained its entity and separate existence.

On the 21st day of August, 1907, the association had, in the National Bank of Commerce in Seattle, the sum of \$1,138.51, deposited in the name of the Shipwrights, Joiners & Calkers Association, L. No. 2. On the latter date, the defendants, who were or had been president and treasurer respectively of the association, withdrew these funds from the bank and turned them over to three persons, claiming to be trustees of the Shipwrights, Joiners & Calkers Association, Local No. 11. The present action was instituted by the association, and by a large number of its members in its behalf, to recover the above sum for the benefit of the association. The case was tried before the court without a jury, and from a judgment in favor of the plaintiffs, the defendants have appealed.

The case presents questions of fact only. The fundamental error underlying the defense grows out of the erroneous assumption that the respondent association changed and became a different and separate entity every time it changed its affiliations with other labor unions or organizations. This assumption has no foundation in law or in fact. Regardless of the changes in membership and the changes in its affiliations, the association itself has remained the same, and the appellants were guilty of a gross breach of trust when they took it upon themselves to pay over its funds to a rival organization without warrant or authority.

The judgment of the court below is therefore affirmed.

CHADWICK, MORRIS, CROW, and DUNBAR, JJ., concur.

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Opinion Per MOUNT, J.

[No. 8895. Department One. November 21, 1910.]

JOSIAH ROCK *et al.*, Respondents, v. O. B. JOSEPH *et al.*,
Appellants.¹

CORPORATIONS—SALE OF STOCK—FRAUD—EVIDENCE—SUFFICIENCY—DEEDS—EXCHANGE OF PROPERTY. A sale of stock in a foreign mercantile company and a deed given in exchange is properly rescinded for fraud, where the vendors represented that it was solvent, doing a prosperous business, and that they had sold shares to their son at \$8 per share, the statements being false and implicitly relied upon by the vendees.

SAME—RESCISSION—TIME—LACHES. A delay of three months, after hearing of false representations, in bringing suit to rescind a sale of corporate stock and cancel a deed, will not preclude a recovery, where the delay was at the request of the plaintiff's son, connected with the corporation, and for the reason that it was being pressed by creditors.

Appeal from a judgment of the superior court for King county, Frater, J., entered November 24, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to vacate a deed. Affirmed.

Graves & Murphy (C. H. Winders, of counsel), for appellants.

Austin E. Griffiths (Paul Shaffrath, of counsel), for respondents.

MOUNT, J.—Respondents brought this action against the appellants to set aside a deed to certain real estate in King county, on the ground of fraud and misrepresentations. The appellants, for answer to the complaint, denied the allegations of fraud, and denied that any misrepresentations had been made to the respondents. Upon the trial of the case, the court found in favor of the plaintiffs, and entered a decree setting aside the deed and restoring the parties to their original status. The defendants have appealed.

¹Reported in 111 Pac. 783.

It appears that the appellant O. B. Joseph was the owner of six hundred shares of stock in the North Coast Commercial Company, Ltd., a British Columbia corporation, doing a mercantile business at Port Essington, in British Columbia. Mr. Joseph represented to the respondents that the corporation was a solvent, going concern, doing a very prosperous business, that he had sold a number of shares to their son at eight dollars per share, and that the profits of the business amounted to a large sum. The respondents, relying upon these representations, traded their home in Seattle, worth about \$6,500, for these shares and a note of \$200, the appellants assuming a mortgage on the home amounting to \$1,500. This trade was made in the month of December, 1908. In January, 1909, the respondents learned that the corporation was substantially insolvent, was not doing a profitable business, and was unable to pay its debts, and that the stock was practically of no value; that appellants had sold some stock to respondents' son, but at less than five dollars per share, instead of eight dollars as represented. On March 30, 1909, this action was begun.

A careful reading of the evidence in the case convinces us that the respondents were imposed upon. The appellant O. B. Joseph knew the condition of the business of the corporation at the time the trade was made, and that the corporation was almost, if not wholly, insolvent; and yet he represented to the respondents that the company was doing a prosperous business, and was not incumbered by debt; that the stock was valuable, when the reverse was the truth. The respondents relied implicitly upon the statements of the appellant, and made no further inquiries until after the trade was made. Upon the record in the case, the trial court could not have come to any other conclusion than the one found.

It is argued by the appellants that the respondents ought not to recover, because they did not promptly upon discovery of the facts rescind, or offer to rescind, the contract. The evidence is not clear as to the exact time when the respond-

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ents were informed of the fraud, but this information was probably received some time about the 1st of January, 1909, when they were informed by their son, who was at that time at Port Essington and connected with the management of the business. This son at that time requested his parents to take no action in the matter for a while, because the creditors of the company were pressing for a settlement of their claims, and any action at that time would be disastrous to the company. We find no evidence of any act other than delay which could be reasonably construed as a ratification after knowledge of the facts, and we are of the opinion that the mere lapse of time, amounting to about three months, did not, under the circumstances of this case, amount to a ratification.

The other errors assigned are not of sufficient importance to justify a reversal, and need not be discussed. Upon the whole record, we are satisfied that the judgment was just, and it is therefore affirmed.

RUDKIN, C. J., PARKER, GOSE, and FULLERTON, JJ., concur.

[No. 8398. Department One. November 21, 1910.]

JULIUS ALBERG, *Appellant*, v. CAMPBELL LUMBER COMPANY,
Respondent.¹

JUDGMENT—CONCLUSIVENESS—BAR—NONSUIT—IMPEACHMENT. A judgment at the close of plaintiff's case upon defendant's motion for a nonsuit, expressly granting a nonsuit, and for defendant's costs, is not a bar to another action, under the provisions of Rem. & Bal. Code, §§ 408-410; and its plain recitals cannot be controverted by a showing that it was in fact on the merits.

Appeal from an order of the superior court for King county, Gay, J., entered February 15, 1910, upon granting a nonsuit, dismissing an action for personal injuries. Reversed.

¹Reported in 111 Pac. 775.

William Martin and Julius L. Baldwin, for appellant.

Hastings & Stedman, for respondent.

MOUNT, J.—This is an action for personal injuries. It appears that the case had been brought and tried to a jury upon a former occasion. Upon that trial the court entered the following order, omitting the formal parts:

“This cause coming on for hearing on the 4th day of March, 1908, before the Hon. R. B. Albertson, judge, sitting with a jury, the plaintiff appearing in person and by his attorney William Martin, and the defendant by its officers and attorneys, Messrs. Hastings & Stedman, the plaintiff introduced his evidence and rested. Thereupon the defendant moved for a nonsuit and the court, after hearing arguments and being advised in the premises, granted defendant’s said motion. Thereafter the plaintiff moved for a new trial, which said motion was by the court denied on March 25, 1908. It is therefore on motion of the defendant ordered that a judgment of nonsuit be entered herein. Wherefore it is ordered, considered, and decreed that the complaint of the plaintiff be dismissed, and that the defendant have and recover its costs and disbursements from the plaintiff, from which said judgment and order denying the plaintiff’s motion for a new trial, plaintiff excepted and his exception is allowed.”

When this order and the record of the former trial were introduced in evidence, the trial court dismissed the action, upon the ground that the order above quoted was *res adjudicata*. The plaintiff has appealed from this order of dismissal.

The only question in the case is whether the order of dismissal in the former action was a judgment upon the merits. The statute provides:

“An action may be dismissed, or a judgment of nonsuit entered, in the following cases. . . . 8. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient cause for the jury.” Rem. & Bal. Code, § 408.

“In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits.” Rem. & Bal. Code, § 409.

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"When a judgment of nonsuit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause." Rem. & Bal. Code, § 410.

The judgment in the former action recites:

"The plaintiff introduced his evidence and rested. Thereupon the defendant moved for a nonsuit and the court, after hearing arguments and being advised in the premises, granted defendant's said motion. . . . It is therefore, on motion of the defendant, ordered that a judgment of nonsuit be entered herein."

It is plain that the order upon its face is nothing more than a judgment of nonsuit, and that, under the statute, such order is not a bar to another action for the same cause.

Respondent, however, contends that the whole record of the former trial shows that the order was made upon the merits of the case. The whole record of that trial was introduced in evidence. The statements of the trial judge in reviewing the evidence offered upon that trial, no doubt, show that a judgment might have been entered upon the merits and the action then finally determined. But the court was not asked to pass upon the merits of the case. The motion was for a nonsuit, and a nonsuit was granted. Conceding that the court might have passed upon the merits and entered a judgment thereon, upon the motion being made for a nonsuit, he did not do so, for the final judgment entered shows upon its face distinctly and directly that he granted only a nonsuit. There may have been some good reason in the mind of the judge for this ruling. If the judgment upon its face were ambiguous or doubtful in any material respect, it may be the rule that the whole record may be resorted to to show what was decided. But no case is called to our attention where it has been held that the plain recitals of a judgment may be contradicted by other parts of the record or by extraneous evidence. The judgment is the final decision upon the record, and where it is plain and specific, it must control, and may not be contradicted in another case or in a collateral

proceeding. As was said in the case of *Hatch v. Wayne Circuit Judge*, 138 Mich. 184, 101 N. W. 228:

"The law touching the question under consideration is correctly stated in *Greenleaf on Evidence* (16th ed.) 305g, as follows: 'The record is, in legal theory, not a testimonial report by the officer of the proceedings, nor a copy of some other written act; it is the proceeding and the act itself; . . . consequently it cannot be shown that something was done which is not noted in the record, or that a thing noted in the record was in truth done differently.' It follows that if there was, as relator claims, error in entering a judgment on the merits, he can obtain relief by, and only by, having the judgment entry corrected; and this relief must be sought in the court that erred, or in a court having appellate jurisdiction."

When a judgment recites that it is upon the merits, or *vice versa*, it may not be shown to be otherwise in a collateral proceeding. Any other rule would lead to endless confusion and litigation. The case of *Bartelt v. Seehorn*, 25 Wash. 261, 65 Pac. 185, and the recent case of *McKim v. Porter*, ante p. 270, 110 Pac. 1073, and cases of that character, are readily distinguished from this case, because there the judgments show that the decisions were upon the merits; while in this case, the judgment is a plain, straightforward nonsuit, and nothing more, which the statute provides is not a bar to another action for the same cause. The trial court was therefore in error in ruling that the former judgment was a bar.

The order appealed from must be reversed, and the cause remanded for trial.

RUDKIN, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

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[No. 8902. Department One. November 21, 1910.]

DORA DARRIN, *Respondent*, v. GLEN C. HUMES *et al.*,
Appellants.¹

QUIETING TITLE—TITLE OF PLAINTIFF—PLEADING—EVIDENCE OF TITLE—SUFFICIENCY. In an action to quiet title, the plaintiff's title is sufficiently shown by a warranty deed, without having deraigned her title, where the defendants claimed under a common source through a void tax foreclosure naming the plaintiff as owner, and the validity of the plaintiff's deed was not disputed, in view of Rem. & Bal. Code, § 8747, providing that a warranty deed shall be deemed and held a conveyance in fee simple.

Appeal from a judgment of the superior court for King county, Clifford, J., entered September 17, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Fred H. Lysons, A. C. MacDonald, and Miller & Lysons,
for appellants.

Brady & Rummens, for respondent.

MOUNT, J.—This action was brought by the respondent to quiet title against the claim of appellants, and for possession of certain real estate. At the trial of the case, the court granted the relief prayed for in the complaint, and the defendants have appealed.

Upon the trial of the case, it appeared that the appellants were in possession of the land under a claim of right by reason of the fact that their grantor had purchased the same at a void tax sale. Appellants knew that the tax sale was invalid and, at the time of the trial, did not claim to have title to the land, but insisted that they had an interest therein by reason of having paid taxes thereon for a number of years. Three questions are presented in the brief of the appellants, to the effect, that the tax foreclosure sale against the respondent was valid; that no tender of taxes which had been paid by the

¹Reported in 111 Pac. 767.

appellants had been made by the respondent prior to the commencement of the action; and that respondent failed to deraign her title to the land. At the oral argument in this court, the first two points were waived, but appellants insist that the action must fail and that the court erred in not dismissing the action, because the respondent failed to deraign her title; and the rule is invoked that the plaintiff must recover upon the strength of her own title, and not upon the weakness of defendant's title.

The respondent introduced in evidence a general warranty deed from Charles B. Darrin, which was duly acknowledged and recorded in October, 1888, long before the taxes were paid by the appellants and long before the tax foreclosure took place. It was conceded that the tax foreclosure under which appellants claim an interest named the respondent as the owner of the land. Our statute provides that a warranty deed, when "duly executed, shall be deemed and held a conveyance in fee simple to the grantee, his heirs and assigns." Rem. & Bal. Code, § 8747. The validity of this deed was apparently not disputed by the evidence, and it was conceded that whatever interest the appellants had was derived from the void tax foreclosure against the respondent, who was the record owner and to whom the property was assessed. Under these circumstances, we think there was sufficient proof of title in the respondent to justify the court in entering a decree quieting title against the claim of the appellant. In *Preston v. Cox*, 50 Wash. 451, 97 Pac. 493, we held that:

"A distribution in probate proceedings of the property of the deceased to his heirs is some evidence of title, . . . and sufficient to support a judgment removing the cloud of tax foreclosure proceedings against land assessed to deceased, as to the parties claiming through the same source."

In that case we said that a judicial determination in probate "is a higher class of proof than would be a deed from an individual grantor who might be a stranger to the title." We also said:

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"The probate proceedings were upon the estate of the same person who owned the land when the assessment was made through which respondents claim. Both, therefore, claim from a common source, and the proof was sufficient to enable appellants to prosecute the action against these respondents."

So, in this case, the parties are claiming from a common source. In addition, the respondent shows title through a warranty deed, which the statute provides shall be deemed and held a conveyance in fee simple to the grantee. It is not shown or contended that the respondent's grantor was a stranger to the title, and it was conceded that the void tax foreclosure conducted by the appellants' grantor showed that respondent was the owner and reputed owner. We are of the opinion, therefore, that the proof of title in the respondent was sufficient, and the judgment must be affirmed.

PARKER, FULLERTON, and GOSE, JJ., concur.

RUDKIN, C. J., concurs in the result.

[No. 8977. Department Two. November 22, 1910.]

A. J. FINLAY *et al.*, Plaintiffs, v. LOUIS TAGHOLM *et al.*,
Respondents, BALLARD LUMBER COMPANY,
Appellant.¹

MECHANICS' LIENS—NOTICE—MAILING—NECESSITY. Under Rem. & Bal. Code, § 1133, requiring a duplicate statement of all materials to be delivered or mailed to the owner "at the time" such material is delivered, a mechanics' lien cannot be claimed where it is admitted that the notice was not mailed until some indefinite time, a few weeks or a month, after delivering the materials.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 18, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to foreclose a materialman's lien. Affirmed.

¹Reported in 111 Pac. 782.

J. P. Wall, for appellant.

Peters & Powell, for respondents.

CHADWICK, J.—The Ballard Lumber Company, on the 28th and 31st days of July 1909, furnished lumber of the value of \$137.83 to Tagholm & Jensen, contractors, who were at that time engaged in building a dwelling house for respondent Nelson. The lower court found, that the material was actually used in the construction of the building; that it was of the reasonable value of \$137.83; and further, "that at the time such materials were delivered to be used in the construction of said building, the Ballard Lumber Company did not deliver or mail to the owners or any one of them a duplicate statement of all such materials so delivered; that on the 20th day of October, 1909, the Ballard Lumber Company filed its duly verified notice of claim of lien in the office of the auditor of King county, Washington, as required by law, for which filing it paid the sum of 65 cents." The one question to be decided is whether the item was lienable under the statute. The law is:

"Every person furnishing material . . . shall, at the time such material or supplies are delivered to any person or contractor, deliver or mail to the owner, or reputed owner, of the property, on, upon or about which said materials or supplies are to be used, a duplicate statement of all such materials." Rem. & Bal. Code, § 1133.

From a decree holding that appellant had not complied with the statute and could not charge the building by lien, this appeal is prosecuted.

There is testimony tending to show that the duplicate statements required by the statute were made out, but we think the court properly held that appellant failed to show a compliance with the statute. The testimony upon this point is brief. Mr. Fisher, the secretary of appellant, testified:

"Q. Did you mail them yourself? A. No, I did not mail them. Q. Who did? A. Miss McLean, the stenographer

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in the office. . . . Q. What time was that mailed, if you know? A. I don't remember the exact time. Q. Was it near the time of delivery? A. It was after the stuff had been delivered. Q. A short time after? A. A short time after, yes. . . . Q. It might have been in September, might it not? A. Well, if I had to swear to it I would not swear it was August. I could not swear to it because I don't remember."

Miss McLean, the stenographer, testified as follows:

"Q. You don't remember when you mailed these bills, do you? A. No, I don't remember when I mailed them. Q. You mailed them at the same time that you mailed your statements to Noyes and Dutton? A. No, I did not mail them just at that time. Q. Was it some time afterwards? A. Some time afterwards, yes. Q. You don't recall how long afterwards? A. I don't remember just how long afterwards it was."

It is contended that the statute should be construed not strictly but liberally, in order to secure liens for materialmen and laborers, and being so construed, a few days' delay—admitting the notice to have been sent at all—was not so unreasonable as to defeat the right of lien. The answer to this argument is that the statute requires no construction. Its terms are plain and its object evident. The law is that a duplicate statement shall be delivered or mailed to the owner or reputed owner "at the time" the material is delivered to the contractor. While a reasonable time might be taken, in the absence of a positive showing this court cannot say, as is contended by appellant, that a few weeks' or a month's delay would be excused. This would defeat the law entirely, it being within itself a complete act (*Spokane Grain & Fuel Co. v. Lyttaker*, 59 Wash. 76, 109 Pac. 316), and its purpose being, not so much to insure a right of lien, as to protect property owners against dishonest contractors.

The cases cited by appellant, *Strandell v. Morgan*, 49 Wash. 533, 95 Pac. 1106, and *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158, are not in point. In each of them there was a primary liability, and the court

held that the bounden party could not escape payment unless it was shown that the omission of the notice required by the contract or statute had misled the party to his disadvantage. Here there was no primary liability, but only such as the statute created. The benefit of the statute depends upon a compliance with its terms.

The judgment of the lower court is affirmed.

RUDKIN, C. J., DUNBAR, CROW, and MORRIS, JJ., concur.

[No. 9065. Department Two. November 22, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. ARTHUR
KRUGER, *Appellant*.¹

INDICTMENT AND INFORMATION—LESSER OFFENSE INCLUDED IN CHARGE—DEGREE OF ASSAULT—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 2415, providing that every person who shall commit an assault or an assault and battery not amounting to assault in either the first or second degrees, shall be guilty of assault in the third degree, an assault in the third degree is not necessarily included in the greater offense, and there can be no conviction of assault in the third degree, under a charge of assault with intent to commit a felony (second degree assault), where the evidence of the prosecutrix showed a consummated rape, and that of the defendant proved an alibi, and there was no evidence of assault in the third degree.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 16, 1910, upon a conviction of assault in the third degree, after a trial upon an information charging assault in the second degree. Reversed.

Crawford E. White and *F. D. Couden*, for appellant.

George F. Vanderveer, *W. H. White*, and *John F. Murphy*, for respondent.

¹Reported in 111 Pac. 769.

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CHADWICK, J.—Appellant was charged with the crime of assault in the second degree. The charging part of the indictment is as follows:

“He the said Arthur Kruger, on the 16th day of January, A. D. 1910, in the county of King, state of Washington, aforesaid, did wilfully, unlawfully, and feloniously assault one Alma Langstrom, with intent then and there to commit the crime of rape.”

The testimony of the prosecuting witness, if believed, shows a consummated rape. Appellant's evidence tends to prove an alibi. The complainant also testified that, on two or three occasions, appellant had robbed her of money. This evidence was introduced and limited by the court to the question of identification of the appellant, the rape having occurred, if at all, at about midnight on January 16, and in an open field. The court submitted to the jury, as an included crime, assault in the third degree, and of this appellant was found guilty. Section 162, chapter 249, Laws of 1909, page 936 (Rem. & Bal. Code, § 2414), defines an assault in the second degree, in so far as it is pertinent to our present inquiry, to be an assault with an intent to commit a felony. Assault in the third degree is defined as follows:

“Every person who shall commit an assault or an assault and battery not amounting to assault in either the first or second degrees, shall be guilty of assault in the third degree.” Rem. & Bal. Code, § 2415.

It is unnecessary to detail the testimony. Suffice it to say that the evidence on the part of the state shows, as we have said, the consummated crime of rape. There is no evidence whatever of an assault in the third degree. Appellant was guilty as charged, or he was not guilty. The evidence leaves no zone of speculation or room for compromise. But it is contended that assault in the second degree includes assault in the third degree, and that the court was warranted in submitting that crime to the jury, and that the verdict was sustained. It is true that the greater includes the less, but the

defendant is not guilty of either unless the testimony brings him within the definition of a crime. It was never the intent of the law to submit a possible verdict upon a so-called included crime because included in law. It must be included in fact, and by the facts of the particular case. The question is not a new one. In *State v. Robinson*, 12 Wash. 349, 41 Pac. 51, 902, it was held that the defendant, if guilty at all, was guilty of murder in the first degree, and that he could not be held upon conviction of manslaughter. The same principle is disclosed in *State v. McPhail*, 39 Wash. 199, 81 Pac. 683, where the court said:

"The position taken by counsel is that the trial court must submit every issue raised by the pleadings to the jury, regardless of the state of the testimony or the absence of all testimony. This contention finds no support in our constitution or elsewhere, and cannot prevail."

In that case the rule, with sustaining authority, is quoted from 11 Ency. Plead. & Prac., page 211, as follows:

"On a criminal prosecution, it is not necessary for the court of its own motion, or on request, to instruct as to the lower grades of crime involved, where there is no evidence on which to base such an instruction. The giving of such an instruction is not only unnecessary but improper."

We are satisfied with the rule as thus declared.

The state relies upon *State v. Dolan*, 17 Wash. 499, 50 Pac. 472, and *State v. Clem*, 49 Wash. 273, 94 Pac. 1079. In the first case the defendant was charged with the crime of assault with intent to commit murder. It was held error to refuse a requested instruction that the jury might find a verdict of assault and battery. The court so held because, as it is said, the jury was entirely precluded from finding the defendant guilty of a less crime, although it may have been satisfied in fact that he was guilty of one of the lesser offenses. There was evidence to show an assault and battery. In the *Clem* case defendant was charged with a robbery from the person, and convicted of petit larceny, the

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court holding that the legislature had not intended to create any new offense, but recognized that there were degrees in larceny, and that petit larceny was but a degree of the offense charged. The defendant was convicted because, under the evidence, he was guilty of petit larceny. Finally, the state says:

"Assault with intent to commit rape, charged in appellant's case, necessarily includes assault or assault and battery, as set forth in the definition of the crime of assault in the third degree. Such an assault as charged could not, in its very nature, have occurred without embracing the lesser degree of assault."

But this is met by the letter of the new criminal code. It is only such an assault or assault and battery as does *not* amount to an assault in the first or second degree that is punishable as an assault in the third degree. The state's facts, if believed, not only showed an assault amounting to assault in the first degree, but the more aggravated crime of rape. Courts cannot submit crimes to juries because they *may* be included in the crime charged. If the evidence brings them within it, it is the duty of the court to so charge. If, on the other hand, the evidence excludes the lesser offense, it is likewise the duty of the court to see that no false issue is submitted to the jury.

The jury having found by its verdict that appellant is not guilty as charged, and there being no evidence to sustain the verdict rendered, the judgment is reversed, and the case will be remanded with instructions to discharge the appellant.

RUDKIN, C. J., CROW, DUNBAR, and MORRIS, JJ., concur.

[No. 9125. Department Two. November 22, 1910.]

FRED B. LUSHINGTON, *Appellant*, v. SEATTLE AUTO AND
DRIVING CLUB, *Respondent*.¹

JUDGMENT—VACATION—ESTOPPEL—DISCRETION. It is not an abuse of discretion to vacate a void default judgment against a corporation, where the claim of estoppel to dispute the judgment was met by counter affidavits.

SAME—AFFIDAVIT OF MERITS. Upon a motion to vacate a default judgment, for the reason that no service was had upon the defendant, an affidavit of merits is not necessary.

SAME—TIME FOR APPLICATION—LACHES. A motion to vacate a judgment, void for want of jurisdiction over the person of defendant, may be made at any time without regard to laches.

CORPORATIONS—ACTIONS—LIST OF OFFICERS—FAILURE TO FILE—EFFECT. Failure to comply with Rem. & Bal. Code, §§ 3691, 3692, requiring a corporation to file a list of its officers with the county auditor, does not prevent the corporation from moving to set aside a judgment secured on service upon one who was not an officer of the corporation.

Appeal from an order of the superior court for King county, Main, J., entered May 25, 1910, vacating a default judgment for want of jurisdiction. Affirmed.

L. J. Kohler and *H. E. Spence* (*Milo A. Root*, of counsel), for appellant.

Frank S. Griffith, for respondent.

CHADWICK, J.—Plaintiff began an action against defendant, a local corporation, and served a summons and complaint upon one J. H. Van Asselt. At the time of service plaintiff believed, and the return of service recites, that Van Asselt was president of the defendant. In fact, his term of office had expired a few weeks before, and at the time of service he had no official connection with the company. Upon a show-

¹Reported in 111 Pac. 785.

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ing of these facts, the trial judge set aside the default and judgment, and plaintiff has appealed.

Appellant urges a state of facts which he insists should estop respondent from questioning the service, or the jurisdiction of the court, it being contended that he was misled by certain officers and stockholders of the company, and that it cannot now be heard to say that the service was invalid; and further that, respondent having through its officers negotiated with appellant for a settlement of the judgment, it is bound, whatever infirmity there may have been in obtaining service upon it. These questions were submitted to the trial judge upon conflicting affidavits. The principal question is, therefore, whether the court abused its discretion in vacating the judgment. We think the record fairly shows that Van Asselt was not the president of the respondent at the time service was made on him, and the evidence of estoppel (if it be the rule that an estoppel will work in such cases) being met by counter affidavits, we must hold that there was no abuse of discretion on the part of the trial judge.

It is further contended that, in any event, the judgment of the lower court must be reversed, because no affidavit of merits was filed in support of the motion to vacate. Appellant relies upon *Hoefer v. Sawtelle*, 43 Wash. 23, 85 Pac. 853, and *Brandt v. Little*, 47 Wash. 194, 91 Pac. 765, 14 L. R. A. (N. S.) 213, and cases there cited. It is true that the *Brandt* case contains some expressions which might give color to appellant's contention, but when we remember that that was an equity case, and that the rule for vacating or modifying judgments in equity still prevails, although possibly without reason under our present forms of practice, and that the original distinctions affecting procedure in vacating judgments at law and in equity have been preserved, it will be understood that that case cannot be held to be controlling in this one. Here a motion was made to vacate a default judgment because jurisdiction had not been obtained over the person of the defendant. In such cases the law re-

quires no showing other than that defendant was, in fact, not served with the process of the court. The right to vacate such judgments does not arise out of, nor does the procedure to secure the right depend upon, the statute. Rem. & Bal. Code, Title 3, ch. 17. It is inherent in the court itself. It is no more nor less than the power possessed by every court to clear its records of judgments void for lack of jurisdiction. *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446. It is only in such proceedings as are brought under the statute that an affidavit of merits, or, if the proceeding be by petition, that a showing of merits is required. But where a judgment is attacked for want of jurisdiction in the principal case, a showing to that effect is sufficient. In *Sturgiss v. Dart*, 23 Wash 244, 62 Pac. 858, this court said:

"But the statute has no reference to the vacation of a judgment entered upon an attempted service of summons void on its face, or, what is the same thing, to a judgment entered without the service of summons at all. Such a judgment is in legal effect no judgment. No rights are acquired or divested by it. It can neither bind nor bar anyone. And a court of general jurisdiction can, by virtue of its inherent powers and without the aid of statutes, clear its records of such a judgment, no matter in what form or in what manner the application to it to do so is made."

And in *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389, "the authorities generally agree that no affidavit of merits is necessary in support of an application to set aside a judgment which is void for want of jurisdiction." Such, too, is the logic of the case of *Snider v. Badere*, 39 Wash. 130, 81 Pac. 302, where a motion to vacate was denied because the judgment was fair upon its face, and no affirmative showing of a want of service was made.

This being so, it follows that appellant's further contention, that respondent was guilty of laches, is without merit.

"It is universally conceded that a judgment void for want of jurisdiction over the person of the defendant may be va-

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cated on motion, irrespective of the lapse of time." *Dane v. Daniel, supra.*

Appellant finally contends that respondent had not filed a list of its officers in the office of the county auditor, as required by Rem. & Bal. Code, §§ 3691 and 3692. This delinquency would not warrant service upon one whose official connection with the corporation had ceased, unless it was so provided by the statute.

Finding no reversible error in the record, the judgment of the lower court is affirmed.

RUDKIN, C. J., CROW, and MORRIS, JJ., concur.

DUNBAR, J., concurs in the result.

[No. 8748. Department One. November 23, 1910.]

In re WESTLAKE AVENUE, Ordinance No. 17,629.

TRIAL—INSTRUCTIONS—COMMENT ON FACTS—EMINENT DOMAIN. In a condemnation proceeding, instructions are not an unlawful comment on the evidence by reason of clauses as to the "special benefits that will accrue to the property" "if you think the conditions that exist.....are unsettled," where they had reference to instructions already given in that connection, and did not assume that there would be any such benefits, but plainly left it to the jury to determine.

NEW TRIAL—GROUNDS—CONFLICTING EVIDENCE. Refusal to grant a new trial because the verdict was contrary to the evidence, is not error where the evidence was conflicting.

Appeal from a judgment of the superior court for King county, Albertson, J., entered August 18, 1909, upon the verdict of a jury rendered in favor of the city, awarding no damages in a condemnation proceeding. Affirmed.

H. A. P. Myers, for appellants.

Scott Calhoun, King Dykeman, and Stephen V. Carey, for respondent.

Reported in 111 Pac. 780.

MOUNT, J.—This is a condemnation proceeding commenced by the city of Seattle, under an ordinance for widening and extending Westlake avenue from Mercer street to the Lake Washington canal, and thence northward to Ewing street. Westlake avenue extends north and south along the shore of Lake Union. Mercer street extends east and west near the south shore of the same lake. The property involved in this proceeding and owned by appellants lies along the east side of Westlake avenue in Fremont, immediately south of the canal, and the ordinance under which this proceeding is being prosecuted contemplates the gradual elevation of the middle portion of Westlake avenue, commencing about fifteen hundred feet south of appellants' property in order to be high enough to cross over the Lake Washington canal. The elevated portion of the street is to be about twenty-seven feet high in front of appellants' property, with a strip forty feet wide of the present level of the street between appellants' property and the bulkhead or side of the elevated portion of the street. The question involved in the trial of the case was the amount of appellants' damages, if any, on account of the construction of this elevated street within forty feet of his property line. The verdict of the jury was against appellants. They found no damages. Thereupon the appellants moved for a new trial, which motion being denied, a judgment followed accordingly. From the judgment of condemnation awarding no damages, this appeal is prosecuted.

It is argued that the trial court erred in giving the following instruction to the jury:

"If you think that the conditions that exist in that locality, without the improvement projected by this ordinance, are unsettled with respect to permanency of grade, with respect to the location of the bridge over the canal, with respect to the line that the government might permit the canal to be used at the present grade; if you think that the present conditions are unsettled so as to affect the market value of the property, then you will inquire from the evidence whether by virtue of this proposed public improvement,

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these conditions will be settled, whether permanency will be brought about affecting the market value of the property, and if, from consideration of the whole case, you are satisfied that the property is damaged in excess of the special benefits that will accrue to it over and above the general benefit flowing to the public from this public improvement, why then your verdict would be for damages with respect to the realty alone in that amount."

Appellants claim that the court, by reference to the unsettled condition with respect to the permanency of the grade and to special benefits, assumes that these conditions exist, and such reference therefore amounts to a comment upon the facts. It is plain from the language of this instruction that the court did not tell the jury that there was an unsettled condition, for the language is, "If you think the conditions that exist . . . are unsettled," etc., thus leaving it for the jury to find the fact. This was not a comment upon the facts. The reference to special benefits did not assume that there were any such, because in a former part of the instructions the court told the jury: "You will ascertain from the evidence now submitted what is the present fair cash market value of the land that is taken, without including any enhancement of the value, if any, that may be found, occasioned by reason of this prospective improvement;" and in regard to the land not taken, the court said to the jury: "If as a result of that regrade, this remaining land will be damaged over and above the special benefits that it may receive as the result of this proposed improvement when it goes through, then he would be entitled to a verdict in the amount of that damage." When the court used the words "special benefits that will accrue to the property," in the instruction complained of, these words had reference to instructions already given in that connection, and plainly did not assume that there would, in fact, be any such benefits. But such question was left for the jury to determine. We think there is no merit in the contention that the court by this instruction commented upon the facts.

It is also assigned as error that the court refused to give a requested instruction. But this instruction appears to have been given in substance. It is, therefore, not necessary to set it out or discuss it further.

It is argued that the trial court should have granted a new trial, for the reason that the evidence is contrary to the verdict finding no damages. It is true that there was evidence which showed damages, but on the other hand there was competent evidence that the improvement would not damage the appellants' property in the least, but would be a great benefit thereto. The case was one, therefore, for the jury.

Finding no error, the judgment is affirmed.

RUDKIN, C. J., PARKER, GOSE, and FULLERTON, JJ., concur.

[No. 9022. Department Two. November 23, 1910.]

LAFAYETTE BORTLE *et al.*, Respondents, v. NORTHERN
PACIFIC RAILWAY COMPANY, Appellant.¹

DEATH—ACTIONS—PERSONS ENTITLED TO SUE—DEPENDENCY—STATUTES—EVIDENCE—SUFFICIENCY. Rem. & Bal. Code, § 194, authorizing an action for wrongful death of a child by parents dependent upon him for support, requires a substantial degree of dependency arising from necessitous want, and a recognition of the necessity on the part of the child; and the evidence is insufficient where it shows only occasional contributions in the nature of gifts to parents who supported themselves.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered April 20, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Reversed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellant.

Bates, Peer & Peterson and Lot Davis, for respondents.

¹Reported in 111 Pac. 780.

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Opinion Per MORRIS, J.

MORRIS, J.—Respondents brought this action to recover for the death of their adult son, alleged to have been caused by the negligence of the appellant. The deceased was hostler's helper at appellant's round house at Tacoma. His work was assisting the hostler in taking engines from where they had been left by the road engineers, to the coal bunkers and ash pit. On the night of his death, he had assisted in moving two engines, and was engaged in moving the third, and when last seen alive was standing with his feet in the stirrups of the tank. When next seen he was lying on the ground unconscious, between the engine and a pile of wood that stood next to the track, at a distance variously estimated by different witnesses from ten inches in the clear to thirty-three inches from the greatest projection to the center of the rail, the theory of respondents being that the deceased was brushed or pushed from the tank under the wheels of the engine by coming in contact with the wood pile, and that it was negligence to pile the wood so close to the track. The action was brought under Rem. & Bal. Code, § 194, providing that no action for personal injury occasioning death shall abate by reason of such death, if deceased leave parents who may be dependent upon him for support. There were, therefore, two issues in the case, (1) the negligence of the appellant, and (2) were respondents dependent upon the deceased for support. Judgment was in favor of respondents upon both issues, and the case is brought here, suggesting error in the denial of nonsuit and in the refusal to grant judgment notwithstanding verdict.

Under the statute the right of action is conferred, not upon parents as a class, but only upon those who may be dependent upon the deceased child for support. Manifestly, unless the evidence shows such dependence, respondents are not entitled to recover. The deceased was twenty-five years of age, and had for some years been away from home, working in various occupations, coming home "a few times each year." The father was fifty-five years old and the mother fifty-one. There

was another son twenty-eight years old who worked on a ranch, and a daughter sixteen years old who lived away from home, working for her board and going to school. The father testified that his health was not good, preventing him from doing hard manual labor, and that his business was soliciting for the sale of tea, in which he averaged about forty dollars a month, out of which he supported himself and wife, who also testified to being in bad health and under a doctor's professional care. The father could give no definite statement as to when or how much the deceased contributed to the support of himself and wife, other than he thought "somewhere around one hundred dollars a year," and "whenever I called on them [the two sons] I got money;" but he was unable to state when he had called on them, or how they had responded. The mother also fixes the amount at about one hundred dollars a year, but was unable to say when the deceased had contributed anything or how much, except that she remembers once he gave her twenty dollars; about a year before his death he gave seven dollars, and in July preceding his death (September 11), he gave five dollars.

This evidence does not, in our opinion, establish such a support or dependency as is contemplated by the statute. It shows nothing more than such gifts as countless sons occasionally bestow upon their parents, with no thought of dependency, nor that it is a gift of necessity. Our statute means something more; while we would not give it such a strict construction as to say it means wholly dependent, or that the parent must have no means of support or livelihood other than the deceased, such a construction being too harsh and not in accordance with the humane purpose of the act. Nevertheless, there must be some degree of dependency, some substantial dependency, a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child. Such we believe to be the general interpretation of like statutes. 8 Am. & Eng. Ency. Law, p. 904, in speaking of like statutes, defines the correct rule as:

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"There must be an actual dependency on the deceased, on the part of the party claiming the right of action. The mere fact that the deceased occasionally contributed to the support of such party, in an irregular way, is not sufficient, where the fact of dependency alone confers the right of action;"

citing *Hodnett v. Boston & A. R. Co.*, 156 Mass. 86, 30 N. E. 224; *Houlihan v. Connecticut River R. Co.*, 164 Mass. 555, 42 N. E. 108, and *Duval v. Hunt*, 34 Fla. 85, 15 South. 876.

In *Daniels v. Savannah, F. & W. R. Co.*, 86 Ga. 236, 12 S. E. 365, the court construes the word "dependent" as meaning substantially and not wholly dependent, and says:

"The contribution to the father or mother by the child need not be wholly sufficient, but only such as is in part sufficient for such support; and that the word dependent means wholly or in part dependent materially upon such child for support."

In *Duval v. Hunt*, *supra*, it is said:

"We think that when the suit is brought by a person who bases his right to recover upon the fact that he is dependent upon the deceased for support, then he must show, regardless of any ties of relationship or strict legal right to such support, that he or she was either from the disability of age, or non-age, physical or mental incapacity, coupled with the lack of property means, dependent in fact upon the deceased for a support. There must be when adults claim such dependence, an actual inability to support themselves, and an actual dependence upon some one else for support, coupled with a reasonable expectation of support or with some reasonable claim to support from deceased."

The evidence here does not bring respondents within the statute. They were in no sense dependent upon the deceased for support. The father was able to follow a daily vocation, and if his earnings only resulted in an average income of \$40 per month, that was the result of his inability to sell more goods, and not his inability to solicit the sale. His necessity must not be judged from his unsuccessful effort to make a larger income, but from his physical ability to make the effort. Neither does an occasional contribution from a son

to a parent establish a condition of dependency. There must be a substantial need on one side and a substantial financial recognition of that need on the other side, to make out a dependency within the meaning of this statute.

For these reasons we think the court was in error in not sustaining the motion for judgment notwithstanding verdict. The judgment is reversed, and the cause remanded with instructions to dismiss.

RUDKIN, C. J., DUNBAR, CROW, and CHADWICK, JJ., concur.

[No. 8966. Department One. November 23, 1910.]

DANIEL J. K. ZIMMERMANN, *Plaintiff* v. C. O. Bosse,
Defendant.¹

FIXTURES—SAWMILL MACHINERY—MORTGAGE OF REAL ESTATE. The machinery in a sawmill and porch column plant consisting of stock goods that are portable and removable from the building without injury to the building, such as engines, lathes, shafting, pulleys, belts, saws, machines, and dry kiln apparatus, are not fixtures, and do not pass under a real estate mortgage; but a tubular boiler, set in masonry and inclosed in brick work which could not be removed without removing the brick work, is a fixture.

Cross-appeals from a judgment of the superior court for Pierce county, Chapman, J., entered February 1, 1910, in favor of the plaintiff, after a trial before the court without a jury, in an action to foreclose a mortgage. Affirmed.

Blackburn & Gielens, for plaintiff.

Huffer, Hayden & Hamilton, for defendant.

PARKER, J.—This controversy arises upon a foreclosure of a mortgage upon real property, and involves the question of whether or not certain pieces of machinery used in a manufacturing plant situated upon the land are fixtures and as

¹Reported in 111 Pac. 796.

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Opinion Per PARKER, J.

such are covered by the mortgage. The learned trial court decreed a certain tubular boiler to be a fixture, and certain other machinery and appliances to be personal property. Foreclosure was decreed accordingly, and both parties have appealed to this court. We will refer to the parties as plaintiff and defendant.

In March, 1909, the Jurin Manufacturing Company, a corporation, was the owner of certain land at Puyallup, in Pierce county, upon which it maintained a sawmill, porch-column and dry-kiln plant. At that time it borrowed from one Perry \$5,000, securing the same by a mortgage upon the real property consisting of the land and appurtenances. The mortgage was the usual form of real property mortgage, so that the machinery and appliances were covered thereby only in so far as they were a part of the realty. The plaintiff became the owner of this debt and mortgage by assignment from Perry. The defendant became the owner of the real property, and also of certain personal property of the mortgagor, Jurin Manufacturing Company, by a deed and bill of sale executed by J. T. Gear, as trustee, in pursuance of orders of the Federal court, in the matter of Jurin Manufacturing Company, a corporation, bankrupt. This conveyance covered the machinery involved, whether it be regarded as real or personal property, since it conveyed all personal property of the bankrupt, with certain exceptions, which exceptions did not exclude from the conveyance any of this machinery.

Learned counsel for the plaintiff contend that the trial court erroneously decreed certain machinery to be personal property and not subject to the lien of the mortgage. This machinery consisted of a portable fire box boiler, engines, lathes, shafting, pulleys, belts, pipes, saws, carriages, conveyors, pumps, edgers, planers, exhaust fans, boring machines, emery wheels, dry-kiln apparatus, and other machines, tools and appliances. Nearly all of these things were in various ways attached to the floors, ceilings or posts of the

buildings; but none were so attached but that they could be removed and taken from the buildings without injury to the buildings. It seems to us quite clear from the evidence that none of these machines and appliances were specially made for these buildings or for this plant. They were all known as standard or stock goods, and sold as such by catalogue and price lists by the manufacturers, and were suitable for use in any plant of this nature. It is true that the dry-kiln apparatus appears to have been made up of different parts put together in the building, and in that sense it might be said to have been made for the plant; but the evidence tends to show that such parts were like the other machines and appliances, stock goods. Under prior decisions of this court, we think it follows that these machines and appliances are not fixtures, but personal property, and hence not subject to the mortgage. *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744; *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639; *Washington Nat. Bank v. Smith*, 15 Wash. 160, 45 Pac. 736; *Philadelphia Mtg. & Trust Co. v. Miller*, 20 Wash. 607, 56 Pac. 382, 72 Am. St. 138, 44 L. R. A. 559; *Neufelder v. Third St. & Suburban R.*, 23 Wash. 470, 63 Pac. 197, 83 Am. St. 831, 53 L. R. A. 600; *Sherrick v. Cotter*, 28 Wash. 25, 68 Pac. 172, 92 Am. St. 821.

There may be some expressions in the case of *Filley v. Christopher*, 39 Wash. 22, 80 Pac. 834, 109 Am. St. 853, viewed apart from the circumstances of that case, seemingly not in harmony with the views expressed in the former decisions of this court, but we do not think the former views of the court were there overruled, in view of the circumstances of that controversy. We are of the opinion that the court was not in error in holding these things to be personal property and free from the lien of the mortgage.

Learned counsel for the defendant contend that the trial court erroneously decreed the large tubular boiler to be a fixture, and therefore subject to the mortgage. This boiler was set in masonry, being practically inclosed in brick work.

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It could not be removed without removing a considerable part of the brick work, though when freed from the brick work it could probably be removed from the building through openings already existing. We think this boiler became a part of the realty. *Filley v. Christopher, supra.*

We conclude that the decree of the learned trial court should be in all things affirmed. It is so ordered. In view of this disposition of the appeals, neither party will recover costs in this court.

MOUNT, FULLERTON, and GOSE, JJ., concur.

RUDKIN, C. J. (concurring)—Inasmuch as the earlier decisions of this court constitute a rule of property, I concur in the result, but as an original question I doubt their soundness.

[No. 9003. Department One. November 23, 1910.]

LYTLE LOGGING & MERCANTILE COMPANY, *Appellant*, v.
HUMPTULIPS DRIVING COMPANY *et al.*, *Respondents*.¹

TRESPASS—TREBLE DAMAGES—WHEN ALLOWED—STATUTES. Upon trespass for cutting and carrying away timber, and for altering the course of a river, Rem. & Bal. Code, § 939, allows treble damages only for the cutting and removal of the timber.

SAME—CUTTING TIMBER—LAWFUL AUTHORITY—APPEAL—REVIEW VERDICT—EVIDENCE—SUFFICIENCY. Under Rem. & Bal. Code, §§ 939, 940, giving treble damages for cutting or carrying off trees or timber without lawful authority, unless the trespass was casual or involuntary, a verdict for single damages, upon an unsupported finding that the trespass was casual or involuntary, will not be disturbed on appeal, where the evidence showed that the cutting was authorized by the plaintiff's superintendent who requested an accurate account of all timber cut; since it warranted a finding that it was not cut *without lawful authority*.

CORPORATIONS—TORTS—OFFICERS—LIABILITY. Where the president and general manager of a corporation directs a trespass to be committed, both are jointly and severally liable for the torts of the latter.

¹Reported in 111 Pac. 774.

Appeal by plaintiff from a judgment of the superior court for Chehalis county, Irwin, J., entered April 16, 1910, upon the verdict of a jury rendered against one of the defendants, and in favor of the other defendant, in an action in tort. Affirmed in part and reversed in part.

C. W. Hodgdon and W. H. Abel, for appellant.

Bridges & Bruener, for respondents.

RUDKIN, C. J.—This action was instituted by the plaintiff against the Humptulips Driving Company, a corporation, and A. P. Stockwell, its president and general manager, to recover damages for changing the course or channel of the Humptulips river upon and across certain lands owned by the plaintiff, and for cutting and removing timber therefrom. The jury returned a verdict in favor of the plaintiff in the sum of \$452.70 for cutting and removing the timber, and in the further sum of \$600 for changing the course or channel of the stream. From a judgment entered on this verdict, the plaintiff has appealed.

The principal errors assigned arise out of the refusal of the court to award treble damages for the trespass, or to give judgment against the respondent Stockwell. Rem. & Bal. Code, § 939, provides that,

“Whenever any person shall cut down, girdle, or otherwise injure or carry off any tree, timber, or shrub on the land of another person, . . . without lawful authority, in an action by such person, . . . against the person committing such trespasses, or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be.”

The following section provides that,

“If upon the trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, . . . judgment shall only be given for single damages.”

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While the appellant in the present action claimed treble damages for the entire trespass, it is apparent, under the statute, that treble damages can only be allowed, if at all, for cutting down and carrying off the timber. We are not much impressed with the claim of the respondents that they in good faith believed, or had probable cause to believe, that the land upon which the trespass was committed belonged to the firm of Walker Brothers, whose consent they had obtained to cut and remove the timber, for a considerable portion of the timber was cut and removed after the respondents had actual notice that the land belonged to the appellant. But however this may be, it appears from the testimony that the appellant's superintendent visited the land upon which the trespass was committed, in the month of July, and again in October and in the latter part of November, 1908. On each of these visits he stopped at the camps maintained by the respondents, and the relations between the parties were intimate and friendly. There is testimony tending to show that, on his first visit, he pointed out the section or lot lines to the foreman of the respondent company, and requested him to keep an accurate account of all timber he might cut. A like request was made of the respondent Stockwell on a subsequent date. From this testimony the jury were warranted in finding that the timber was not cut *without lawful authority*, or, in other words, that the appellant acquiesced in and consented to the cutting and removal of the timber, subject to an accounting for its actual value. For this reason we are not disposed to disturb the finding of the jury that the trespass was casual or involuntary, and the judgment as to the respondent corporation will stand affirmed.

On the other hand, the testimony clearly shows that the trespass was committed by direction of the respondent Stockwell, who is the president and general manager of his co-respondent. Under this state of facts, the court instructed the jury that Stockwell was not individually liable, if he

acted in good faith as an officer of the company, and not with a wilful intent to commit a trespass upon the lands of the appellant. This instruction was erroneous under repeated rulings of this court, for in such cases the master and servant are jointly liable for the torts of the latter. *Lough v. John Davis & Co.*, 30 Wash. 204, 70 Pac. 491, 74 Am. St. 848, 59 L. R. A. 802; *Sipes v. Puget Sound Elec. R.*, 54 Wash. 47, 102 Pac. 1057.

The judgment must therefore be affirmed as to the respondent corporation and reversed as to the respondent Stockwell, with directions to award a new trial as to the latter. It is so ordered.

FULLERTON, GOSE, PARKER, and MOUNT, JJ., concur.

[No. 8876. Department One. November 23, 1910.]

ELIZABETH OUELLETTE *et al.*, Appellants, v. OLYMPIA JIM
et al., Respondents.

ELIZABETH OUELLETTE *et al.*, Appellants, v. DICK JACKSON
et al., Respondents.

ELIZABETH OUELLETTE *et al.*, Appellants, v. HARRIET
KORTER, Respondent.¹

BOUNDARIES—LOST CORNERS—EVIDENCE TO ESTABLISH—SUFFICIENCY—SURVEYS—FIELD NOTES. A survey to locate a lost corner on the west meander line of a section, by reference to the witness trees called for in the field notes, from which point other corners, noted in the field notes as marked by a pile of stones, are located on the meander line approximately at high tide mark, takes precedence over and overcomes a survey of the south line of the section by courses and distances, whereby the west meander line of the section is established further west, and twenty-five rods below ordinary high tide in 18 feet of water at high tide, where a meander line could not have been run.

¹Reported in 111 Pac. 790.

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Opinion Per RUDKIN, C. J.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered February 14, 1910, in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

G. C. Israel and *Frank C. Owings*, for appellants.

Troy & Sturdevant, *George H. Funk*, and *H. J. Snively*, for respondents.

RUDKIN, C. J.—These several actions were instituted to recover possession of and quiet title to parts of lot 4, of section 13, tp. 19 N., R. 3, West, W. M., in Thurston county, and were consolidated for the purposes of trial. From a judgment in favor of the defendants, the plaintiffs have appealed.

The Northern Pacific Railroad Company received a patent for lot 4, and other lands, under the act of Congress of July 2, 1864, and the appellants claim title to lot 4 through mesne conveyances from that company. The parts of lot 4 in controversy lie below the line of ordinary high tide on Totten Inlet, and are claimed by the respondents as oyster lands, under deeds and contracts from the state. The only question we deem it necessary to determine on this appeal is the correct location of the meander line along the westerly side of fractional section 13, of which lot 4 forms a part. Fractional section 24 lies immediately south of fractional section 13, and there is no dispute between the parties as to the true location of the following monuments bounding these two sections, viz., the northwest corner of fractional section 13, the northeast corner of fractional section 13, the southeast corner of fractional section 13, which is also the northeast corner of fractional section 24, and the southeast corner of fractional section 24.

The principal question in controversy is the true location of the southwest corner of fractional section 24, for with that corner located the meander line can be readily traced from

the field notes by courses and distances. In locating this corner and tracing the meander line, the appellants followed the field notes of the original survey on file in the office of the surveyor general, by courses and distances from the southeast corner of the section, and if this method is to be adopted and followed, it is conceded that the lands in controversy are within the confines of lot 4, and are included in the patent under which the appellants claim. *Kneeland v. Korter*, 40 Wash. 359, 82 Pac. 608, 1 L. R. A. (N. S.) 745. This line we will hereafter refer to for convenience as the appellants' survey. The respondents, on the other hand, made a survey of the south line of section 24, and the west line of fractional sections 24 and 13, which we will refer to as the respondents' survey. By this latter survey the southwest corner of fractional section 24 was located, by reference to the bearing or witness trees described in the field notes, at a point 5.90 chains east of the corner as fixed by the appellants' survey. In other words, the distance along the south line of fractional section 24, according to the measurements given in the field notes, is 79.50 chains, whereas, the distance is only 73.60 chains if the southwest corner is located by reference to the bearing or witness trees mentioned in the field notes. The rule prescribed by the department of the interior for relocating missing or lost corners is the following:

"The identification of mounds, pits, and witness trees, or other objects noted in the field notes of survey, affords the best means of relocating the missing corner in its original position. If this cannot be done, clear and unquestioned testimony as to the locality it originally occupied should be taken, if such can be at all obtained. In any event, whether the *locus* of the corner be fixed by the one means or the other, such *locus* should always be tested and proven by measurements to *known* corners. No definite rule can be laid down as to what shall be sufficient evidence in such cases, and much must be left to the skill, fidelity, and good judgment of the surveyor in the performance of his work." 1 Land Decisions, 676.

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Many of the rules given for the ascertainment of lost boundaries are not inflexible; but in this case the bearings of the post at the southwest corner of section 24 are thus given in the field notes:

"A fir, 20 ins. dia., N. 43° E., 66 lks. dist.,
" " 14 " " N. 29° W., 100 " "
" " 18 " " S. 3° E., 18 " "

and an error in the measurement of the distance across the section is far more likely to occur than an error in the measurement of the shorter distances to the several witness trees. Furthermore, the respondents' survey located the west center post of section 24 by reference to the bearing trees at that point, and this location corresponds with the southwest corner of the section when located by reference to the bearing trees there, whereas, the appellants' survey located this same post approximately six chains farther west. Again, according to the field notes, the surveyor "set a post on the S. E. beach of Totten Inlet, for cor. of frac. sec. 13 and 24, and piled stones around it as per instructions." This corresponds with the respondents' survey at the same point, which located this corner approximately at the line of ordinary high tide, whereas, the appellants' survey located the same corner approximately 25 rods below the line of ordinary high tide, in upwards of 18 feet of water at extreme high tide. We are convinced that no corner was ever located at such a point, and that no meander line was ever surveyed or located along the line indicated by the appellants' survey, for such a line could only be run at extreme low tide if at all. The record in this case abundantly shows that government surveying is not one of the exact sciences, but we are fully convinced that the respondents' survey is approximately correct, and that no part of the land in controversy lies within lot 4 as claimed by the appellants. The judgment is therefore affirmed.

FULLERTON, GOSE, PARKER, and MOUNT, JJ., concur.

[No. 8957. Department One. November 23, 1910.]

PACIFIC LUMBER AND TIMBER COMPANY, *Appellant*, v. E. J.
DAILEY *et al.*, *Respondents*.¹

MECHANICS' LIENS—TIME OF FILING—EVIDENCE—SUFFICIENCY. In an action to foreclose a mechanics' lien, a finding that lumber was not delivered until after the 17th is not warranted by the evidence, where the teamster's receipt was dated that day, and there was evidence that it was made out on the day of delivery and was signed by the contractor; and such written receipt is not overcome by oral evidence of the contractor, sixteen months later, that he was of the impression that the lumber was all laid before that day, supported by his foreman to the same effect, who quit work on the 18th, their testimony resting on memory.

APPEAL—REVIEW—FINDINGS. On appeal in an equity case, the supreme court is not bound by the findings of the lower court, especially where written evidence conflicts with oral testimony resting on memory, as there is a trial *de novo* on appeal.

MECHANICS' LIENS—WAIVER—BURDEN OF PROOF. The burden of showing a waiver of a mechanics' lien, by clear, certain and unequivocal evidence, is upon the party asserting it.

MECHANICS' LIENS—WAIVER—EVIDENCE—SUFFICIENCY. A waiver of a mechanics' lien, conditional upon giving a mortgage subject only to a mortgage of \$1,200, cannot be enforced where either the minds of the parties did not meet, or the property was subject to three mortgages aggregating more than that sum, and no tender of performance was made.

Appeal from a judgment of the superior court for King county, Main, J., entered March 4, 1910, in favor of the defendants, after a hearing on the merits before the court without a jury, in an action to foreclose a materialman's lien. Reversed.

Douglas, Lane & Douglas, for appellant.

Fred H. Peterson and *Philip D. Macbride*, for respondents.

GOSE, J.—The plaintiff furnished certain building material to the defendant Dailey, who as a contractor was building a residence for the defendants Gaunce upon lot 4, block 25, in

¹Reported in 111 Pac. 869.

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Denny-Fuhrman addition to the city of Seattle. The contractor having defaulted in payment, the plaintiff, on January 4, 1909, filed with the county auditor of King county a notice that it claimed a lien upon the property above described. This action was brought for the purpose of foreclosing the lien, and to secure a personal judgment against the contractor. After a hearing upon the merits, the court denied the lien, dismissed the action as to the defendants Gaunce, and entered a judgment against the defendant Dailey. Plaintiff has appealed.

The respondents Gaunce make two contentions: (1) That the lien was not filed for record within ninety days after the last material was delivered, and (2) that the right to assert a lien was waived by an agreement made between all the parties in interest subsequent to the last delivery of material. We will consider these contentions in the order stated.

The pivotal question is whether an item of one hundred feet of flooring was delivered on or prior to October 17, 1908. If delivered prior to that date, the notice of lien was not filed within ninety days after the last delivery, and the right to assert a lien must be denied. If delivered on or after that date, the lien is enforceable. We think that the preponderance of evidence clearly establishes the delivery of this material on October 17. The appellant, to sustain the burden it assumed under the issue, offered in evidence the following receipted bill:

	Pacific Lumber & Timber Co.,
	3718 12th Avenue, N. E.
6186	Seattle, Wash., Oct. 17, 1908.
Sold to	E. J. Dailey
Delivered at	Cor. Broadway & Shelby.
	100 ft. 1 $\frac{3}{8}$ x2 $\frac{5}{8}$ Flg. No. 1 12'
	E J D
Tallyman	Williams
Driver	teamster
Received the above	

The respondent Dailey testified that the flooring was used in the porch to the house; that the letters "E J D" were

signed by him, and signify that he received the lumber at the house. He further says that it is his impression that the porch had been completed before the date in question. His foreman testified that he quit work on the house on October 18, as shown by his time book, and that the flooring was all laid before the 17th. The case was tried on February 16, 1910, sixteen months after the delivery of the item in dispute.

We do not think the oral testimony, depending of necessity largely upon the memory of the contractor and his foreman, can be permitted to overcome the strong presumption arising from the teamster's receipt. The witnesses are supported by no written memorandum other than the one made by the foreman, showing only the last day he worked on the house. In support of the correctness of the date shown in the teamster's receipt, the appellant's shipping superintendent testified that it is the custom to bill material in triplicate, the original and one copy being given to the teamster, and the other copy retained; that the bills are dated on the day the material is delivered, except that material loaded late in the day is delivered the next day, and that the teamster returns the receipted bills and they are checked the following day. The receipt is fair upon its face, the signature of the contractor is admitted, and the appellant would have had no motive in post-dating the bill. At the time of the delivery of this item it had ample time for the filing of the notice of lien. We think the receipt speaks the truth, and that it, with the explanation of the appellant's delivery clerk, must be held to meet the burden which the law throws upon the party having the affirmative. The material having been delivered "to be used in the construction" of the house, and the lien having been filed within the time limited by law, the lien is enforcible, unless it has been waived. Rem. & Bal. Code, § 1129.

But the respondents say: "Clearly this is a case of conflicting testimony, where the decision of the trial court is final." If this statement were true, appeals in equity cases would be useless. Such cases are tried here *de novo*. While

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it is true that this court will give due and proper weight to the findings of the trial court upon questions of fact, it is likewise true that it has an independent duty devolved upon it by law to review and weigh the evidence. If the judgment in this case depended upon oral testimony alone, we would be loath to disturb the conclusion of the trial court. But viewing the written evidence as we do, we are persuaded that the learned trial court was in error in its conclusion that the delivery of the last item of material was prior to October 17. The contractor admits the delivery and use of the material. The issue is the date of the delivery of the material evidenced by the receipt which we have set forth.

The next inquiry is, did the appellant agree to waive the lien. The evidence showing an agreement to waive a lien must be clear, certain, and unequivocal. The burden of showing this fact is upon the party asserting it. *Holm v. Chicago, Milwaukee, and Puget Sound R. Co.*, 59 Wash. 298, 109 Pac. 799. Briefly stated, the contention of the respondents Gaunce is, that they had an indemnity mortgage for \$1,500 upon the property of their co-respondent, subject to a prior mortgage of \$1,200, and that the appellant agreed that, if they would pay other claims which Dailey had contracted in building the house, and release their indemnity mortgage, the appellant would take a deed to Dailey's property as security for its claim and waive its lien against the Gaunce property. They assert that they paid the other claims, and that they stand ready to deliver the release of their mortgage. They have not tendered their release, nor has Dailey tendered the appellant a deed or other security. Upon investigation, the appellant found that Dailey had three mortgages on his property besides the indemnity mortgage; one for \$800, one for \$400, and a third for \$461. The appellant asserts that it agreed to waive the lien only upon condition that the respondents Gaunce should procure Dailey to execute to it a security deed, subject only to one mortgage for \$1,200. A careful reading of the testimony convinces

us that one of two views must obtain; (1) that the minds of the parties did not meet upon all the substantials of the contract, or (2) that the respondents failed to carry out the contract as agreed upon. Under either view, the right to assert the lien was not waived.

We think the learned trial judge was in error in denying the lien. The judgment is therefore reversed as to the respondents Gaunce, with directions to enter a decree establishing and foreclosing the lien for the amount of the judgment entered against Dailey, and for a reasonable attorney's fee to be fixed by the court.

RUDKIN, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9086. Department One. November 23, 1910.]

FINIS TECKER *et al.*, Respondents, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, Appellant.¹

STREET RAILROADS—OPERATION OF CARS—FENDERS—MUNICIPAL REGULATIONS—REASONABLENESS—POLICE POWERS. An ordinance requiring a street car company to equip its cars with fenders extending as near its tracks as practicable, so that persons struck *may* be either raised and carried or pushed from the track, is not unreasonable as requiring a guarantee that the fenders *shall* in all cases perform the desired functions; and such ordinance is within the police powers of the city.

STREET RAILROADS—OPERATION OF CARS—FENDERS—COMPLIANCE WITH REGULATIONS—QUESTION FOR JURY. It is a question for the jury to determine whether a street car fender, twenty-two inches above the track, was carried as near the rails as was consistent with practical operation of the cars, where there was testimony that it was practical to carry them eight inches above the track.

STREET RAILROADS—INJURY TO PERSONS ON TRACK—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The jury is warranted in finding gross negligence on the part of a motorman in running down a child six years old, where a moment before the motorman had been talking with a passenger and not looking at the track, and when he first observed the child it was fifteen feet ahead of the car, crossing the street in a

¹Reported in 111 Pac. 791.

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place of safety "if it had stopped," but it kept going and paid no attention to the gong, the car was going up grade, the day was clear and the view unobstructed.

SAME—CONTRIBUTORY NEGLIGENCE—CHILDREN. A child six years of age is not, as a matter of law, guilty of contributory negligence in running across a street in front of an approaching street car, its conduct indicating that it had not seen the car.

SAME—ACTION FOR DEATH—CONTRIBUTORY NEGLIGENCE OF PARENT. A parent is not guilty of contributory negligence, as a matter of law, precluding recovery for the death of a child six years of age, struck by a street car, in sending the child in care of another, ten years old, to the post office, two blocks away.

SAME—NEGLIGENCE—CROSSINGS—INSTRUCTIONS. It is not error to instruct that negligence is a relative question, and that a street car company is required to exercise greater care at crossings than at other places, where fewer people are likely to be encountered.

SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTIONS. In an action for the death of a child struck by a street car, it is not error to instruct that the burden of proving contributory negligence is upon the defendant, and properly defining what would constitute contributory negligence.

DEATH—DAMAGES—EXCESSIVE VERDICT. A verdict for \$2,564, for the value of the services of a boy six years old, killed by a street car, is not excessive, where the father was blind and in the business of selling notions, and intended to use the boy when of proper age to lead him about.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 19, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Affirmed.

Morris B. Sachs, for appellant.

Fred H. Peterson and *Philip D. Macbride*, for respondents.

GOSE, J.—On March 20, 1908, a minor son of the plaintiffs was run over and killed by one of the defendant's electric cars, in Heller street at its junction with Rainier boulevard, in the city of Seattle. This action was brought to recover damages to the amount of the value of the boy's services during his minority. There was a verdict and judgment

for the plaintiffs in the sum of \$2,564. The defendant has appealed.

The negligence charged is three-fold: (1) The failure of the motorman to keep his eyes fixed upon the track in front of the moving car; (2) his failure to give a signal or warning of the approach of the car at the crossing where the accident happened; and (3) the failure of the appellant to comply with the city ordinance requiring it to carry a fender upon its cars as near to the roadbed as practicable. The appellant denied these charges of negligence, and pleaded affirmatively that the boy lost his life on account of his negligence and the negligence of the respondents. This was denied. At the close of respondents' testimony, the appellant moved for a nonsuit, and when all the evidence had been submitted, it moved for a directed verdict in its favor. Both motions were denied. It now assigns error upon the denial of the motions, and the giving and refusal to give certain instructions.

The ordinance, which is the basis for the third charge of negligence, is as follows:

"An ordinance requiring corporations and individuals owning, managing or operating street railways within the city of Seattle to provide the cars run or used upon such street railways with guards and appliances for the prevention of accidents, and providing penalties for the violation thereof. Approved May 15, 1896.

"Be it ordained by the City of Seattle as follows:

"Sec. 1. Street Car Fenders, How constructed:—All corporations, companies and individuals owning, managing or operating any street railway or line in the city of Seattle shall provide all cars run on their respective roads with a guard, protector or fender upon the front end of each car, which guard, protector or fender shall extend at its foremost point as near to the roadbed as shall be practicable and shall be so constructed and adjusted that any person or object struck by any such car while in motion may be either raised from the ground by said guard, protector or fender and carried along by said car until the same can be stopped, or be pushed from the track." Seattle Ordinance, No. 4,189.

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The appellant first contends that the ordinance is unreasonable and void, and that the evidence shows that it is impossible for it to comply with its terms, and cites, *St. Louis v. Heitzeberg Packing & Provision Co.*, 141 Mo. 375, 42 S. W. 954, 64 Am. St. 516, 39 L. R. A. 551; *People v. Admire*, 39 Ill. 251; *Potter v. Douglas County*, 87 Mo. 239; 26 Am. & Eng. Ency. Law (2d ed.), 642; *Platt v. Albany R.*, 170 N. Y. 115, 62 N. E. 1071, and *Hogan v. Citizens' R.*, 150 Mo. 36, 51 S. W. 473. In the *Heitzeberg* case, the court considered the validity of an ordinance which provided that "the emission into the open air of dense black or thick grey smoke" within the corporate limits of the city of St. Louis is a nuisance, and fixed a penalty for its violation without regard to whether it was injurious to health or property. It was held that the city did not have the power to declare that a nuisance which was not such in fact, and that its failure to provide for an inquiry as to whether the emission of smoke was detrimental to the public health or injurious to property made it unreasonable and void. The court, however, stated that it was "entirely competent for the city to pass a reasonable ordinance" looking to the suppression of smoke when it becomes a menace to health or property. The *Admire* case was a suit brought by the distributees of an estate against the sureties upon the bond of a deceased administrator. It was held that the statute requiring a demand upon the administrator before the commencement of the suit could have no application to a case commenced against his sureties after his death. It was said that the statute should receive a reasonable construction, even though such construction qualifies its letter. In the *Douglas County* case, it was held that the constitutional prohibition against the city or its political subdivisions becoming indebted to an amount exceeding in any year the income and revenue of such year, without the previous authorization of the people expressed at the polls, has no application to a debt incurred by the county in favor of the sheriff for the maintenance of persons committed to the county jail. The

rule stated in 26 Am. & Eng. Ency. Law (2d ed.), 642, is that, where a restricted construction of a statute would render it a nullity as contravening the fundamental law, courts will favor a more liberal interpretation. In the *Albany Railway* case it was held that, where the city had passed an ordinance requiring street car companies to equip their cars with fenders, they had a reasonable time after the passage of the ordinance in which to comply with its requirements. In *Citizens' R. Co.* case, it was held that there was no error in striking from the complaint an averment that the defendant negligently failed to provide its cars with a fender, in the absence of a statute or an ordinance which made it its duty to place fenders on its cars.

It is argued that the ordinance makes it the absolute duty of the appellant to provide a fender which will in every case raise from the ground a person with whom it comes in contact, and that the evidence shows that no fender has been devised which will in every instance perform such function. We think the ordinance, when read as an entirety and given a reasonable interpretation, means that the fender shall be carried as near to the roadbed as is consistent with the practicable operation of the car, to the end that persons coming in contact with it *may* not pass under it and be crushed and mangled, but that they *may* be raised and carried upon it. It was intended as a measure to protect human life; but it does not assume to impose upon the company the burden of guaranteeing that a suitable fender, carried at a proper distance from the rails, will in all cases perform the desired functions. This view makes the ordinance a reasonable one. It cannot be successfully urged that a municipal corporation has not the power, as well as the duty, to protect the lives and bodies of the people by all reasonable measures. This is a part of the well-recognized police power of every city. *People v. Detroit United R.*, 134 Mich. 682, 97 N. W. 36, 104 Am. St. 626, 63 L. R. A. 746. The learned trial court correctly interpreted the ordinance.

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The jury were instructed that they should find from the evidence whether the fender was carried as near the roadbed as was practicable, and whether, in the light of the evidence, it was a practicable one within the meaning of the ordinance, and that the appellant could not be required to provide fenders that were not consistent with the practicable operation of the cars. Evidence was given which tends to show that the fender upon the car which struck the boy was twenty-two inches above the roadbed, and that it is practicable to have them extend within eight inches of the roadbed. The appellant further contends that it was the duty of the court to construe the ordinance, and that it was error to submit the question of fact to the jury. The question as to the height of the fender above the roadbed, as well as the question whether it was carried as near the roadbed as was consistent with the practicable operation of the cars, was an issue of fact to be submitted to and determined by the jury. The court could not determine either of these propositions as a matter of law. *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28 45 Pac. 996; *Noren v. Larson Lum. Co.*, 46 Wash. 241, 89 Pac. 563. The court, in submitting these questions to the jury, necessarily determined in advance that the ordinance was a reasonable exercise of the police power of the city.

It is next urged that the motion for nonsuit and a directed verdict should have been granted, (1) because there is no evidence warranting the conclusion that the appellant was negligent, and (2) that the death of the boy resulted from his negligence and the negligence of the respondents. What we have said in relation to the issue of fact upon the sufficiency of the fender discloses that the motion upon the first ground was not well taken. We will, however, briefly refer to the evidence, with a view to ascertaining whether there are any other acts of negligence shown, and whether the jury might infer that the negligence of the appellant in other respects was the proximate cause of the injury.

The evidence tends to show that the boy was of the

age of six years and seven months; that a few minutes before the accident the mother directed her oldest child, a daughter ten years of age, to take the boy and go to the post office on the corner of Rainier boulevard and Heller street, two blocks from her home, to get the mail; that when the girl arrived at the post office she left her brother on the sidewalk and went into the store; that when she came out, about five minutes later, the car had run over and killed him; that at the time of the accident, or an instant before, the motorman was looking to the east side of the car, talking with some one on the platform at York Station at the south side of Heller street, and not looking in the direction of the moving car; that the boy ran from the west side of the track to and upon the track; that he was looking across the track, running and waving his hands to some one, and that the motorman did not ring the bell. The motorman testified that, when he first observed the boy, he was about fifteen feet from the track, and in a place of safety "if he had stopped;" that he kept ringing the gong, but that the boy "kept going right along," and that the boy "was about fifteen feet of the car, running across through the street over the crossing." The car was going up grade, the track was straight, the day was clear and bright, the view unobstructed. We think there was evidence from which the jury might find that the motorman was guilty of gross negligence.

It is argued that, when a motorman sees a child in a position of perfect safety, he is not bound to anticipate that he will suddenly run in front of the car. The court instructed the jury, in substance, upon this point that, when a motorman observes a person in a place of safety, he has a right to assume that he will not put himself in a place of danger; but that, when he sees that danger is imminent, it is his duty to use every effort in his power to stop the car, and avoid causing an injury. The appellant was not entitled to a more favorable instruction. If, by the exercise

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of proper vigilance, the motorman could have seen the child in time to stop the car and avoid striking him, it was his duty to do so; and if, when he saw the boy, his conduct indicated that he was intending to cross the track, and that he had not seen the car or heard the signals, if any were given, it was the duty of the motorman to use every effort to stop the car. *Forrestal v. Milwaukee Elec. R. & Light Co.*, 119 Wis. 495, 97 N. W. 182; *Citizens' St. R. Co. v. Hamer*, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778; *Baird v. Citizens' R. Co.*, 146 Mo. 265, 48 S. W. 78. It is clear that, considering the age of the boy, we cannot say that he was guilty of such negligence as will defeat a recovery. It was for the jury to determine, in the light of all the circumstances, whether he acted with that degree of care and prudence which might reasonably be expected of a child of his age and intelligence. *Citizens' St. R. Co. v. Hamer*, *supra*.

We do not think that it can be said, as a matter of law, that the respondents are guilty of contributory negligence. The girl who accompanied the boy was, as we have seen, ten years of age. The mother had sent them to the post office for the mail, two blocks distant, a few minutes before the accident.

"Nor can it be said, as matter of law, that the parents of a child are negligent in permitting him to go upon the street in the care of another child of sufficient age to appreciate and avoid danger, or other competent custodian. In such cases the question of negligence should be submitted to the jury." 29 Cyc. 558.

The parent is only required to exercise ordinary care in watching and controlling the child. 29 Cyc. 556. *Cameron v. Duluth Superior Traction Co.*, 94 Minn. 104, 102 N. W. 208. The appellant urges that, under the authority of *Vinnette v. Northern Pac. R. Co.*, 47 Wash. 320, 91 Pac. 975, the parents were guilty of negligence in permitting the boy to go upon the street attended only by his sister. In that case a child six years of age was permitted, unattended,

to cross the tracks of a switch yard in front of the home. This was held to be negligence upon the part of the parents.

It is next contended that the court erred in giving certain instructions, and in its refusal to give other instructions requested, touching the question of the negligence of the appellant, the contributory negligence of the respondents, and the sufficiency of the fender. The latter question has been disposed of. On the question of negligence, the court instructed, in substance, that the burden was upon the respondents to establish some act of negligence alleged in the complaint by a preponderance of the evidence and that the negligence of the appellant was the proximate cause of the death of the child; that negligence consists in doing some act which reasonable prudence forbids or in failing to do some act that like prudence would direct; that the law requires a street railway company to exercise reasonable care in the operation of its cars; that whether it has exercised such care is a relative question; and that it is required to exercise a higher degree of care at crossings, where pedestrians are "more likely to be," than at other points. The latter part of the instructions is criticized. The standard of due care in a given case is what a reasonably prudent man would do under the same circumstances. Surely it cannot be gainsaid that the prudent man would exercise greater care in the operation of a car at crossings, where he is likely to encounter many people, than he would at other places where there are fewer people. *Forrestal v. Milwaukee Elec. R. & Light Co.*, *supra*.

Upon the question of contributory negligence, he instructed that the burden of establishing contributory negligence by a preponderance of the evidence was upon the appellant; that the contributory negligence which would prevent recovery would be some act upon the part of the respondents, the girl who accompanied the boy as their agent, or the boy himself; that if they should find from the evidence that it was negligence to send the boy out, considering his age, negligent to

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leave him alone upon the street, or if the child negligently, carelessly, and heedlessly went in front of the car, and that any of these acts contributed to his injury, there could be no recovery. There was no error in the instructions given, or in refusing the instructions requested.

Finally, it is contended that the verdict is excessive. The evidence shows that the father is blind; that his business is selling notions, and that he intended to use the boy, when he reached the proper age, to lead him about after school hours and during vacation. The boy was a bright boy, in good health. The jury was instructed that the respondents could only recover the value of the boy's services during his minority in excess of his maintenance and education. The amount found was within the evidence and, while we think it is liberal, we cannot say that it is excessive.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, MOUNT, and PARKER, JJ.,
concur.

[No. 9096. Department One. November 25, 1910.]

OTTO BRAEGER *et al.*, *Plaintiffs and Appellants*, v. BOLSTER &
BARNES, *Defendants and Appellants*.¹

ACCOUNTING—INTERPLEADER—ACTION—NATURE. An action is for an accounting and not one of interpleader, where the plaintiffs brought into court a balance admitted to be due and claimed by defendants and their creditors, without first having had an accounting as provided for by the contract, and prayed that the plaintiffs be allowed the sum deducted, and it appeared that the amount was in dispute and was less than the sum found to be due by the court upon an accounting.

COSTS—ACCOUNTING. In an action in the nature of an interpleader, but in fact for an accounting, in which the amount was in dispute, costs may be awarded against the plaintiffs instead of against the amount paid into court by plaintiffs, where the court found a greater sum to be due from the plaintiffs.

¹Reported in 111 Pac. 797.

LOGS AND LOGGING—LIENS—TOOLS. A lien upon logs cannot be claimed for a cable, boom chains, shoeing horses, and like articles furnished merely as tools and appliances for carrying on the work of logging.

Cross-appeals from a judgment of the superior court for Thurston county, Irwin, J., entered March 11, 1910, upon findings in an action of interpleader and for an accounting, after a trial before the court. Affirmed on plaintiffs' appeal, and modified on defendants' appeal.

Thomas M. Vance and Harry L. Parr, for plaintiffs.
E. N. Steele and Troy & Sturdevant, for defendants.

MOUNT, J.—The appellants Braeger & Birchler had advanced \$1,800 to respondents Balch & Drewry, which money was used by the latter in a logging business. On November 12, 1907, an agreement was entered into by these parties, whereby a part of the logs owned by Balch & Drewry were conveyed to Braeger & Birchler, to secure them for the advance made as above stated. Thereafter, on November 18, 1907, Braeger & Birchler advanced \$1,426 for labor liens, in addition to the \$1,800 above stated. On the latter date, another contract was entered into, conveying other logs to Braeger & Birchler, to secure the further advance and other sums which might be necessary. It was agreed by these contracts that Braeger & Birchler should sell the logs so conveyed, and after deducting the moneys advanced and the expense of caring for and marketing the logs, an accounting should be had and the balance paid to Balch & Drewry. Thereafter Braeger & Birchler paid a claim for stumpage, amounting to \$940. Subsequently the logs were sold for a net price of \$5,978.63. Pending the sale of the logs, certain orders were drawn by Balch & Drewry upon Braeger & Birchler. Among these orders was one in favor of Bolster & Barnes for \$1,080.10. This order was accepted by Braeger & Birchler as follows:

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"We accept the above order, subject to a further lien right held by P. J. O'Brien or any others who hold just liens or right to lien."

Subsequently this action was brought by Braeger & Birchler, who set up in the complaint the contract above referred to, and alleged that they had sold the logs for the net price of \$5,978.63; and that after deducting the amount due from Balch & Drewry, for advances made and claims paid upon orders of Balch & Drewry, there remained a balance in the plaintiffs' hands of \$1,269.65, which was claimed by certain creditors of Balch & Drewry. A number of the creditors of Balch & Drewry were made parties defendant. This \$1,269.65 was paid into court.

The complaint prayed that the plaintiffs be allowed \$100 for attorney's fees, and that they be adjudged entitled to the amount of \$4,708.98, which they had expended as above stated. Balch & Drewry answered the complaint, admitting certain indebtedness, but denied certain claims which were alleged to have been paid, and prayed for a correct accounting of the funds. Bolster & Barnes appeared in the action, and after denying certain items of the complaint, set up an order of Balch & Drewry for \$1,080.10, and prayed that this amount be adjudged a prior claim against the fund in court. P. J. O'Brien also appeared, and set up a lien claim for \$373.24. Other parties who were made defendants also appeared and made claims against the funds. Upon a trial of the case, the court found that the plaintiffs had received for the logs \$5,978.63, from which they were entitled to deduct \$4,583.98, leaving a balance of \$1,394.65, which was adjudged to be paid by the clerk of the court in the following order: P. J. O'Brien, \$373.24; Martin Hardware Company, \$109.75; Bolster & Barnes, \$911.66; making a total of \$1,394.65. A personal judgment was rendered against the plaintiffs for the difference between the amount of these claims, viz., \$1,394.65, and the amount which had been paid into court, viz., \$1,269.65, and also taxing costs against the plain-

tiffs. The plaintiffs have appealed from that judgment, and Bolster & Barnes have appealed from the award of \$911.66.

It is argued by the plaintiffs that the action is a strict action in interpleader or in the nature of interpleader, under the statute, and that therefore the court erred in awarding a personal judgment against the plaintiffs and in not awarding costs out of the funds paid into court. We have no doubt that the plaintiffs intended to bring the action within the statute relating to interpleader; but when the issues were made up, it was not such an action at all, but resolved itself into an action for an accounting, in which the plaintiffs claimed a certain amount out of the fund in their possession and the defendants denied the amount of that claim. It does not appear that any accounting had ever taken place between the plaintiffs and Balch & Drewry, as provided for in the contract between them. The plaintiffs had sold the logs and paid certain claims and certain orders drawn upon them. Some of these claims were denied, and the amounts of others were disputed by Balch & Drewry. The plaintiffs were being annoyed by orders and garnishments, and brought the action without any settlement or accounting, and paid the amount which they conceived to be due Balch & Drewry into court. If the amount had been the balance found due upon an accounting, or if it had not been disputed, then it might be claimed that the action was one in interpleader. But when there had been no accounting and the amount due was in dispute, the action was one of accounting strictly. The court found, we think correctly, that the plaintiffs were indebted in a greater sum than the amount paid into court, and therefore properly awarded the judgment for the balance, which of course carried the costs.

Upon the appeal of Bolster & Barnes it appears that P. J. O'Brien had filed a lien claim against the logs for \$373.24, being for cable, boom chains, shoeing horses, and the like, and by reason of this lien claim, contends that he is a preferred creditor and has a prior claim upon the fund by reason of

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such lien. There was some evidence that Bolster & Barnes made an oral agreement that this claim should be paid ahead of their order, but this was disputed. This court has recently held that "articles furnished for use merely as tools and appliances in carrying on the work of construction are not lienable." *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 Pac. 541. Under this rule, it is plain that O'Brien had no valid lien claim against either the logs or the fund arising therefrom. There appears to have been no contest upon the amount of the claim of Bolster & Barnes. It follows that this claim should have been paid ahead of the claim of Mr. O'Brien.

The judgment appealed from is modified so that the whole claim of Bolster & Barnes, \$1,080.10, shall be paid ahead of the claim of Mr. O'Brien. In other respects the judgment will stand affirmed, with costs against the plaintiffs in the action.

RUDKIN, C. J., FULLERTON, GOSE, and PARKER, JJ., concur.

[No. 8689. Department Two. November 25, 1910.]

THE STATE OF WASHINGTON, *on the Relation of*
Norbert R. Sylvester et al., Plaintiff, v.

THE SUPERIOR COURT FOR BENTON
COUNTY, *Defendant.*¹

CERTIORARI—REVIEW—CESSATION OF CONTROVERSY. A writ of certiorari to review an order suspending a temporary injunction will be quashed where the suspension was to permit the institution of a condemnation suit, which was dismissed pending the hearing; since the suspension has become inoperative, and the relator can apply to the lower court for relief.

EMINENT DOMAIN—RAILROADS—RIGHTS IN STREETS—INJUNCTION TO PROTECT TRESPASS. A court of equity will not protect a railroad company in the use of a public street, pending condemnation proceedings, where the company had no franchise and was a trespasser in the street *ab initio*.

¹Reported in 111 Pac. 787.

Certiorari to review an order of the superior court for Benton county, Holcomb, J., entered March 12, 1910, suspending a temporary injunction. Quashed.

Moulton & Henderson and Cain & Hurspool, for plaintiff.

Danson & Williams, Linn & Boyle, and T. M. Vance, for defendant.

RUDKIN, C. J.—The plaintiffs in the court below were the owners of certain lots in the town of Kennewick, abutting on Front street, one of the public thoroughfares of the town. On the 26th day of February, 1910, the North Coast Railroad Company entered upon the street in question in the nighttime, and was proceeding to tear up the street and construct its railroad therein in front of the plaintiffs' property without any franchise from the town, and without any condemnation or appropriation of the plaintiffs' property rights in the street. A temporary restraining order was granted without notice, at the suit of the plaintiffs, to restrain the company from occupying or using the street, until notice could be given and a hearing had on the plaintiffs' application for a temporary injunction. Thereafter the operation of the temporary restraining order was suspended or held in abeyance by the following order:

"It appearing to the court that an action has been commenced in this court by the above named defendant for the purpose of condemning and ascertaining the damages, if any, that said plaintiff will sustain to lots 1, 2 and 3, in block 2, of the First Addition to the Town of Kennewick, by reason of the proposed construction, maintenance and operation by defendant of a railroad along and over the north thirty feet of Front street, in the Town of Kennewick, it is by the court ordered and decreed, that the temporary restraining order heretofore issued, be and is hereby held in abeyance in order to enable said defendant to diligently prosecute said condemnation proceeding."

The plaintiffs thereupon applied to this court for a writ of review, to review the last mentioned order, and the record

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is now before us. Since the record was brought here, and since the argument before this court, the condemnation suit instituted by the railroad company, and referred to in the foregoing order, was dismissed by order of this court, on the ground that the railroad company had no franchise in the street, and could not therefore condemn or appropriate the rights of the abutting property owners in the street. *State ex rel. Sylvester v. Superior Court*, ante p. 279, 111 Pac. 19.

Since the dismissal of the condemnation suit, the order suspending the operation of the temporary restraining order has become inoperative, and the relators may obtain such relief as they are entitled to by motion in the court below. For this reason the writ of review must be quashed.

In view of further proceedings in the action, we desire to say, however, that the court below misconstrued the decisions of this court upon which the order suspending the operation of the temporary restraining order was apparently based. In *Slaght v. Northern Pac. R. Co.*, 39 Wash. 576, 81 Pac. 1062, and the numerous cases therein cited, this court held, in effect, that where a property owner stands by and permits a railroad company to construct its railroad upon his land, without objection or protest, he cannot thereafter recover the right of way in an action of ejectment, or restrain the operation of the road by injunction, without first giving the company an opportunity to acquire the right of way by condemnation. But the railroad company in this case does not bring itself within the reason or the equity of these decisions. Here there has been no acquiescence on the part of the land owners, and no consent to the construction of the road, express or implied. The company was a trespasser *ab initio*, and acquired no rights by its trespass which a court of equity can respect or protect. To permit a railroad company to acquire even a temporary right to occupy the property of another by such means is a palpable invasion of the constitutional and property rights of the citizen. The record will

be remitted to the court below for further proceedings not inconsistent with this opinion, without costs to either party.

PARKER, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 9181. Department One. November 25, 1910.]

GATE CITY LUMBER COMPANY, *Respondent*, v. THE CITY OF
MONTESANO *et al.*, *Appellants*.¹

MUNICIPAL CORPORATIONS—CONTRACTS—BONDS ON PUBLIC WORK—
MATERIALMEN—MECHANICS' LIENS. Rem. & Bal. Code, § 1133, requiring the mailing of duplicate statements to the owner of property, is part of the mechanics' lien law, and has no application to bonds required of contractors on public work to secure laborers and materialmen employed on the work, under Id., § 1159.

SAME—CONTRACTOR'S BOND—LIABILITY OF CITY—NOTICE. Where a city failed to require a contractor to enter into a bond for the performance of public work and the payment of debts incurred, as required by Rem. & Bal. Code, § 1159, the city's liability therefor is absolute; and the requirement of § 1161 for notice being for the protection of sureties has no application.

SAME—CONTRACTOR'S BOND—MATERIALMEN AND JUST DEBTS—WHAT CONSTITUTES—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 1159, requiring a city to take a bond from contractors on public work for the security of "materialmen" and "just debts incurred in the performance of the work," a lumber company does not bring itself within the terms of the statute by loading lumber on the cars at a distance and billing it to the contractor, where part of the lumber was diverted to other places from the cars and not used in the work nor delivered on the ground for use.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered April 18, 1910, upon findings in favor of the plaintiff, in an action to recover for materials furnished to a city contractor. Reversed.

O. M. Nelson, for appellants.

W. H. Abel, for respondent.

¹Reported in 111 Pac. 799.

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RUDKIN, C. J.—On the 3d day of August, 1908, the defendant city entered into a contract with the defendant Montesano Planing Mill Co., wherein the latter agreed to re-plank a certain elevated roadway for the city, at the agreed price of \$14.50 per thousand for all lumber used in the performance of the work. Between the 24th day of August and the 25th day of September, 1909, the plaintiff sold and delivered to the contractor three car loads of lumber, to be used in the performance of its contract, at the agreed price of \$642.76. The city failed to require the contractor to enter into a bond, conditioned that it would faithfully perform all the provisions of its contract, and pay all laborers, mechanics, subcontractors and materialmen, and all persons who should supply the contractor or subcontractor with provisions and supplies for carrying on the work, all just debts, dues and demands incurred in the performance of such work, as required by the act of March 18, 1909, Laws of 1909, p. 716 (Rem. & Bal. Code, § 1159), the material parts of which are as follows:

Section 1, provides that when any council, acting for the municipality, shall contract with any person or corporation to do any work for the municipality, such council shall require the person or persons with whom such contract is made, to make, execute and deliver to such council a good and sufficient bond with two or more sureties, or with a surety company as surety, conditioned that such person or persons shall faithfully perform all the provisions of such contract, and pay all laborers, mechanics, and subcontractors, and materialmen, and all persons who shall supply such person or persons or subcontractors with provisions and supplies for the carrying on of such work, all just debts, dues and demands incurred in the performance of such work. The next section provides that, if the mayor and common council of any incorporated city or town shall fail to take such bond, such incorporated city or town shall be liable to the persons mentioned in the preceding section to the full extent and for the full amount of all such debts so contracted by such contractor.

The present action was instituted against the contractor, its receiver, and the city, to recover the contract price of the material thus furnished, and from a judgment in favor of the plaintiff, according to the prayer of its complaint, the defendant city has appealed.

The appellant first contends that the action against it cannot be maintained because the respondent failed to deliver or mail to the owner or reputed owner of the property a duplicate statement of the material furnished, as required by section 1 of the act of March 4, 1909, Laws of 1909, p. 71 (Rem. & Bal. Code, § 1188). This section is a part of the mechanics' lien law of the state, and has no application to a case of this kind. The act requiring municipalities to take bonds from contractors is complete in itself, and contains no provision or requirement such as the appellant relies on here.

It is next contended that the notice prescribed by section 3 (Id. § 1161) of the act was not given. Such notice is only required when the statutory bond has been taken. The notice is for the protection of sureties, and has no application to a case like this where no bond was in fact taken. In such cases the liability of the city is made absolute by section 2 of the act.

It is lastly contended that all of the material for which a recovery is sought was not used in the construction of the roadway. The facts relating to the sale and delivery of the lumber are as follows: At or about the time the contract for the construction of the roadway was entered into, the defendant company informed one of the officers of the respondent that it was figuring on such a contract, and inquired at what price the respondent could furnish certain material. The respondent replied, \$9 per thousand, f. o. b. at the mill. Later the defendant company sent a written communication to the respondent inquiring the lowest price at which certain specified material could be furnished, f. o. b. Montesano. The respondent replied in substance, \$9 per thousand, f. o. b. at Gate. This letter was followed by an order for the material. Pursuant to this order, one carload of lumber was

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shipped August 25th, a second September 9th, and the third September 25th. The testimony is very indefinite and uncertain as to the disposition made of the three carloads of lumber on their arrival at Montesano. It does appear, however, that some part of it was actually used in the construction of the roadway covered by the contract in question; some part of it was perhaps delivered on the ground for use in the construction of the roadway, but was afterwards diverted and used in other street work; and a considerable part was diverted to other places from the cars and was neither used in the construction of the roadway, nor delivered on the ground to be used therein.

The question then arises, who is a materialman, and what is a just debt incurred in the performance of contract work, within the meaning of the act of 1909. In the case of *Fuller & Co. v. Ryan*, 44 Wash. 385, 87 Pac. 485, we held that a materialman could not claim a lien for material which was neither used in the building nor delivered on the ground for use therein. See, also, *Foster v. Dohle*, 17 Neb. 631, 24 N. W. 208; *Weir v. Barnes*, 38 Neb. 875, 57 N. W. 750. We are not disposed to place a broader construction on the term *materialman*, and *just debts incurred in the performance of contract work*, under this statute. A more liberal construction would permit of the grossest frauds on the part of contractors, and is not necessary for the protection of *bona fide* materialmen. It appears from the testimony in this case that at least three different lumber concerns furnished material to be used in this roadway, and if a materialman brings himself within the terms of the statute by simply loading lumber on the cars at a distant point and billing it to the contractor without more, it can readily be seen that the contractor can mulct the city, or the sureties in case a bond is given, for the value of material many times in excess of the requirements of his contract.

In *Foster v. Dohle*, *supra*, the court said:

"But it will not be seriously contended that the mere fact

that the owner enters into a contract with a builder to erect or repair a building authorizes the builder to go to every lumber yard in the city and every hardware store and purchase from each a sufficient quantity of material for the erection or repair of the building in question, and make the owner of the building liable therefor. If all this material was delivered by the materialmen at the building, and they acted in entire good faith, it is possible the owner might be liable, because the delivery of the material would be notice to him of the unusual quantity which was being furnished for which he might be liable. But that question is not before the court. The contractor, however, unless expressly constituted such, is not the agent of the builder, and cannot bind him by contracts for materials not put into the building or delivered at the same for use therein. As there is nothing to show that any of the material not allowed by the court below was delivered at or used in the building the owner thereof is not liable for the same."

While that was a lien case, the argument against allowing claims for material which is not actually used in the structure or delivered at the same for use therein is equally applicable here. For this reason, we are satisfied that the respondent did not bring itself within the requirements of the statute as to a considerable portion of the material for which a recovery was allowed, but the testimony is so indefinite and uncertain that it is impossible for this court to make a final disposition of the case.

The judgment will therefore be reversed, and a new trial awarded for the purpose of ascertaining the value of the material actually used in the performance of the contract, or delivered at the works for use therein. The court will give judgment for such value when ascertained, but the respondent is entitled to recover nothing from the city beyond this.

FULLERTON, GOSE, MOUNT, and PARKER, JJ., concur.

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Opinion Per PARKER, J.

[No. 9008. Department One. November 25, 1910.]

AUGUSTE JANKOWSKY, *Respondent*, v. RUTH W. SLADE,
Appellant.¹

FRAUD—DAMAGES—SALES—REPRESENTATIONS. Damages for fraud in the sale of furniture and a monthly tenancy of a lodging house are recoverable where the sale was induced by false representations to the effect that the vendor had positive information that the landlord was in Alaska and the lease could be continued for two years, and the purchaser was, in about two months, compelled to vacate the location, which was the principal consideration for the sale.

Appeal from a judgment of the superior court for King county, Main, J., entered February 5, 1910, in favor of the plaintiffs, after a trial on the merits, in an action on contract. Affirmed.

R. E. Thompson, Jr., for appellant.

Fred H. Peterson and *Philip D. Macbride*, for respondent.

PARKER, J.—This controversy was commenced by the defendant, attempting to foreclose, by notice and sale, a chattel mortgage upon certain rooming house furniture belonging to the plaintiff. Thereupon the plaintiff commenced this action resulting in the foreclosure proceedings being transferred to the superior court under Rem. & Bal. Code, § 1110. The mortgage was given by the plaintiff to secure the sum of \$110, balance of the purchase price of the furniture sold by the defendant to the plaintiff. The plaintiff seeks to recover \$410 damages alleged to have resulted to her from false representations made in connection with the sale by the defendant, to have such damages offset against the balance of the purchase price secured by the mortgage, and to have judgment for the excess. A trial resulted in the court's denying the foreclosure of the mortgage, and rendering judgment against the defendant in the plaintiff's favor in the sum of \$200. The defendant has appealed.

¹Reported in 111 Pac. 773.

There were no findings made by the court, and none requested to be made by counsel for either side. A careful reading of the evidence convinces us that there was evidence sufficient to warrant the court in believing that the following facts were established: Prior to, and at the time of, the sale of the furniture, appellant was owner thereof, and using it in conducting a rooming house in Seattle, occupying the house under a month to month tenancy. The furniture, including the business and location, was sold by appellant to respondent for the sum of \$510, in April, 1909, \$400 of the purchase price being paid in cash, and the balance of \$110 secured by the mortgage upon the furniture. The respondent thereupon went into possession of the furniture and the rooming house with a view to continuing the business there. The furniture was of comparatively small value, being worth not over \$200. The securing of the location for continuing the business was the principal cause inducing respondent to make the purchase, this being well-known to appellant. The representations made by appellant to respondent, touching the probability of her being permitted to remain there as a tenant of the building, thus enabling her to continue the business, is the principal subject of controversy.

At the time of the sale, appellant stated to respondent, in substance, that respondent could get a lease of the place for two or three years; that the agent for the building was a Mr. Russell, in Seattle, but that he had no other authority than merely to collect the rent; that there was no use to go and see him except only to pay the rent; that the landlord was away in Alaska; that appellant was certain that if respondent would purchase the furniture she could remain there as a tenant as long as the house remained there, which would be not less than two years, probably three years; that appellant had positive information from the landlord that the building would remain there at least two years, and would not be torn down; and that during the period that the building was there the landlord would permit her to continue the business there.

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The landlord was not away in Alaska, and had not made any such statements to appellant, which was well-known to appellant at the time she made the representations to respondent. Respondent relied upon these representations, and was thereby induced to buy the furniture and thus acquire the location for the business, paying \$510 therefor, while the furniture, aside from its connection with the prospective tenancy of the building, was worth not over \$200. Respondent was compelled by the landlord to vacate the building about two months later.

In addition to the contention of learned counsel for appellant that the evidence does not establish the facts as above related, which need not be further noticed, it is further contended that the representations, even if false, "would only be a representation of somebody else's statements, known to be such by the plaintiff, and she had no right to rely upon them." We think the representations amounted to more than this. If appellant had merely told respondent what the landlord had said about allowing the house to remain and the tenancy to continue, and nothing more, there might be some merit in counsel's contention. Appellant did not stop there, but took particular pains to say to respondent that she was certain appellant could remain there for two years or more; and then, evidently for the very purpose of inducing respondent to make no further inquiry, appellant informed respondent that the landlord was away in Alaska and there was no use of seeing the agent as he had no authority other than to collect the rent. We think this presents a different question from those decided in *English v. Grinstead*, 12 Wash. 670, 42 Pac. 121, and *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216, cited by appellant's counsel.

It is pointed out that respondent knew that the tenancy was only from month to month, and could be terminated by the landlord at the end of any month. In other words, that, even if the representation had been made by the landlord direct

to the respondent, she would not have an enforceable contract for a lease for any such period as it was contemplated that the business could be continued there. Of course, specific performance of such a contract, it not being in writing, could not be enforced; but that would not prevent the recovery of such part of the consideration as might have been paid by respondent for such oral assurance that she could occupy the premises for that period. If real property is purchased under an oral contract of sale, the purchase price being partly or wholly paid, and nothing further done, the fact that in law specific performance of the conveyance can not be enforced does not mean that the vendor can keep both the money paid upon the purchase price and the property. In this case we think the evidence clearly indicates that the parties contemplated that, beyond the fair value of the furniture, the purchase price was paid with a view to securing the location. Appellant assured respondent that she would, by the purchase, secure the location for at least two years. This was not secured; so, beyond the fair value of the furniture, which was not to exceed \$200, respondent received nothing save the privilege of occupying the house about two months as a tenant, evidently at the usual rent. It seems to us that the learned trial court was not in error in holding that respondent was damaged in the amount of the judgment rendered in her favor, and that appellant is legally liable therefor.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

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Opinion Per DUNBAR, J.

[No. 9103. Department Two. November 25, 1910.]

H. SWEENEY, *Appellant*, v. SILAS ARCHIBALD *et al.*,
Respondents.¹

CONTRIBUTION—PAYMENT OF JUDGMENT FOR LIEN—MECHANICS' LIENS. In consolidated actions to foreclose mechanics' liens, the owner, upon payment of a judgment in favor of a materialman, may enforce contribution from the contractor who was ultimately liable therefor.

JUDGMENT—FORM—CONSOLIDATED ACTIONS—MULTIPLICITY OF SUITS. A technical objection to the form of a judgment, in consolidated actions, which simply avoids a multiplicity of suits, is not ground for reversal.

Appeal from a judgment of the superior court for King county, Robert H. Lindsay, Esq., judge *pro tempore*, entered May 28, 1910, upon findings in favor of the defendants, in consolidated actions to foreclose mechanics' liens, after a trial on the merits. Affirmed.

Charles E. Congleton (*Milo A. Root*, of counsel), for appellant.

Chas. F. Munday and J. F. Pike, for respondents Archibald.

Walter S. Fulton, for respondent Crane Company.

Roberts, Battle, Hulbert & Tennant, for respondents Pederson and Western Lime Company.

DUNBAR, J.—Respondents Archibald and wife were the owners of certain real estate in the city of Seattle, and contracted with Pederson, one of the respondents, to erect upon the premises a hotel building. Pederson sublet to appellant Sweeney the installation of the plumbing and hot water plant. The respondent Crane Company furnished to Sweeney, to be used in said building, certain materials, a portion of which was not paid for, and a lien was filed and established and

¹Reported in 111 Pac. 788.

judgment rendered, with attorney's fee of \$250. These lien foreclosure cases were consolidated for the purpose of trial, and from the judgment rendered in three of the cases, viz., Sweeney v. Archibald, Sweeney v. Pederson, and Sweeney v. Crane Company, this appeal is taken. The appeal is from the findings of fact and the judgment flowing therefrom, and from the judgment of \$250 awarded to respondent Crane Company.

We have made a very particular examination of the testimony in all of these cases, and from such examination we have concluded that the findings of the court were fully justified and sustain the judgment rendered. So far as the objection to the \$250 attorney's fee in favor of respondent Crane Company is concerned, it is purely technical, and so far as the interests of the appellant are concerned, reaches no further than the form of the judgment. For, conceding the correctness of the findings generally, the appellant is the principal obligor, and is ultimately responsible for the costs of the proceedings and the necessary attorney's fees; and upon payment by Archibald of respondent Crane Company's claim, he would have a right to enforce contribution against appellant. The judgment as directed by the court simply avoids a multiplicity of suits. Affirmed.

RUDKIN, C. J., CROW, CHADWICK, and MORRIS, JJ., concur.

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Opinion Per MOUNT, J.

[No. 8771. Department One. November 25, 1910.]

ROBERT A. WILEY *et al.*, Respondents, v. NORTHERN PACIFIC
RAILWAY COMPANY, Appellant.¹

EVIDENCE — ADMISSIONS — PLEADING STRUCK OUT. An answer stricken out on motion of a defendant is not competent as an admission to prove any of the facts stated therein, as the same is *functus officio*, and its admissions are not binding on the defendant.

Appeal from an order of the superior court for Chehalis county, Irwin, J., entered December 29, 1909, granting plaintiff a new trial, after granting a nonsuit, in an action of ejectment. Reversed.

George T. Reid, J. W. Quick, and John C. Hogan, for appellant.

Conway & Snider and W. E. Campbell, for respondents.

MOUNT, J.—This is an appeal from an order granting a new trial. The action was brought by the respondents to eject the appellant from the occupation of lots 3 and 5, block 9, Aberdeen tide lands, and for damages. The case was tried to a jury. At the close of plaintiffs' testimony, the court granted a nonsuit, upon the ground that the plaintiffs had failed to show that the defendant was occupying any part of the lots. Upon a motion for a new trial, the court concluded that there was some evidence that defendant was occupying a portion of the lots, and therefore granted the motion for a new trial. The defendant has appealed.

The complaint alleged ownership and the right of possession in plaintiffs, and that the defendant wrongfully withholds possession from the plaintiffs. The answer denied these allegations, and as an affirmative defense, alleged that, prior to the date when the plaintiffs purchased the lots from the

¹Reported in 111 Pac. 801.

state of Washington, the defendant had constructed and was operating a railroad over

“all those portions of lots numbered 3 and 5, in and of tract number 9, of Aberdeen tide lands, according to the plat thereof on file with the commissioner of public lands of the state of Washington, lying and being north of a line parallel to, and 24 feet distant southerly from—when measured at right angles—the center line of the Northern Pacific railway company’s track, as it was on the 12th day of April, 1907, and is now constructed, maintained, and operated over and across lots 3, 4 and 5, of section 10, T. 17, north, of range 9, west of the Willamette Meridian, in Chehalis county, Washington;”

that on said date the fee of said strip of land was in the state of Washington, and plaintiffs had filed their application to purchase said lands; that on April 15, 1907, the defendant began an action against the state of Washington and the plaintiffs to condemn such lands, and had filed a notice of *lis pendens*; that subsequently the defendant caused the plaintiffs to be dismissed from said action; that subsequently the plaintiffs intervened in said action, and that the same is still pending, and if plaintiffs have acquired any interest in said lots, they acquired the same with notice and subject to the rights of the defendant. These allegations were denied by a reply.

When the case came on for trial, the affirmative answer was stricken out by the court, at the request of the defendant. The action was then tried upon the complaint and general denial of the answer. Upon the trial of the case the plaintiffs contended that they were not bound by the official plat of said land, as made and filed in the office of the commissioner of public lands, but attempted to show by oral testimony that the railway was constructed below the line of mean high tide, as it existed when the state was admitted into the Union. This evidence was finally rejected by the trial court, and the dismissal was ordered; but, upon the motion for a new trial, the court was of the opinion that the north line of lot 5 was

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within about twelve feet of the center line of the railway for about two-thirds of the length of the lot, and that the north line of lot 3 was within about eighteen feet of the length of the tract nearly the whole length of the lot, and for that reason granted the motion for a new trial.

It appears that the railway had been constructed many years before the tide lands were surveyed and platted by the state, and before the sale of the land to the plaintiffs by the state. We find nothing in the plats in evidence, or in the oral testimony, to show that the railway occupies any part of said lots 3 and 5, as platted and sold by the state, except certain statements contained in the affirmative answer, which answer was stricken out of the case before the trial began. This answer was clearly not competent to prove the facts therein stated. *Mechem v. McKay*, 37 Cal. 154; *Johnson v. Powers*, 65 Cal. 179, 3 Pac. 625; *Woodworth v. Thompson*, 44 Neb. 311, 62 N. W. 450.

The case of *Kiefer v. Lara*, 56 Wash. 43, 104 Pac. 1102, relied upon by respondents, is not in point, because in that case the same contract which was relied upon was set out in two different complaints, and was relied upon in each case, and the terms of the contract itself were in dispute; while in this case the affirmative allegations of the answer were stricken and not relied upon. As was said in *Mechem v. McKay*, *supra*:

"The pleading on which a party goes to trial is the one on which he places his defense or cause of action, and he is bound by its admissions. But in many cases it would operate as a gross injustice to hold him to be bound by the admissions of a former pleading, made, perhaps, under a mistake of facts, and which has become *functus officio* by the substitution of an amended pleading."

Aside from the answer, which was stricken, we find nothing in the record in this case to justify the court in granting a new trial. The order must therefore be reversed.

RUDKIN, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 8948. Department One. November 25, 1910.]

G. NAHER *et al.*, Appellants, v. ERNEST M. FARMER *et al.*,
Respondents.¹

ADVERSE POSSESSION—MISTAKE AS TO BOUNDARIES—TACKING. Title by adverse possession may be acquired of lands inclosed and improved under a mistake as to the true boundary line of the lot covered in the deed, and successive periods of occupation may be tacked, although the deeds purported to convey only the lot conveyed in the first deed, where there was privity, and the successive occupants were not aware of the mistake and there was nothing on the ground to indicate the same.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 7, 1909, upon findings in favor of the defendants, in an action of ejectment, after a trial before the court without a jury. Affirmed.

Fred H. Peterson and *Philip D. Macbride*, for appellants.
E. M. Farmer, for respondents.

MOUNT, J.—This action was brought to recover possession of a strip of land, a little more than seven feet wide across the end of lot 3, block 36, supplemental plat of A. Pontius addition to Seattle. The allegations of the complaint were denied, and the defendants pleaded title by adverse possession. The trial court found in favor of the defendants, and entered a decree accordingly. The plaintiffs have appealed.

The facts are as follows: Lots 3 and 4, of the block named, are located about the center of the block. The two lots join end to end, and extend east and west through the block. There is no alley. On May 3, 1898, Margaret J. Pontius owned both lots. At that time, both lots being vacant, she sold lot 4 to one H. W. Broughton, who immediately took possession thereof and begun to improve the same by fencing the lot and building a dwelling and out-building thereon. Thinking

¹Reported in 111 Pac. 768.

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the rear line of lot 4 was a continuation of the rear line of a lot on the south, Mr. Broughton placed his fence some seven and seven-tenths feet over the actual line of his lot, and on to lot 3. He thereafter constructed a building on the rear of the lot up to the rear fence. The part of the rear of the lot not covered by the building was cultivated to garden, berries, and trees. When Mr. Broughton made the improvement, he supposed he had inclosed only his own lot, which he intended to hold. In September, 1902, Broughton sold lot 4 to one Weixal, who went into possession of the property as inclosed, thinking that it was a part of lot 4. Thereafter, in 1907, the title to lot 4 passed to these respondents, who took possession of the tract inclosed, understanding that lot 4 was included therein.

Appellants, by mesne conveyance from Margaret J. Pontius, acquired lot 3 in 1907. This lot was at that time, and still is, vacant and unimproved. In April of 1909, this action was begun, more than ten years after respondents and their predecessors had taken possession of the strip of land in dispute.

The appellants take the position that possession cannot be tacked to make out title by prescription, when the deed under which the last occupant claims title does not include the land in dispute, and that it must clearly appear in the deed that the particular premises were embraced in the deed or transfer. While it is true that the deeds which passed the title to the successive owners described only lot 4, there was nothing to indicate the boundaries of that lot upon the ground except as it was inclosed and improved. It appears that the owner, from the time of the purchase by Mr. Broughton in 1898 down to the time of this action, believed that lot 4 was the tract of land within the inclosure, and possession of the inclosed premises was held openly and exclusively, and the conveyances were made thereof as lot 4. Under these circumstances the description in the deed must be held to include the land in dispute. The general rule is that "if there is

privity between successive occupants holding adversely to the true title continuously, the successive periods of occupation may be united or tacked to each other to make up the time of adverse holding." 1 Cyc. 1000. This court, in *Weingarten v. Shurtleff*, 51 Wash. 602, 99 Pac. 739, said:

"While the numerous deeds under and through which the respondents claim title only purport to convey lots one and two, it nevertheless, clearly appears that the respondents and their predecessors in interest have at all times claimed that the dividing line between the two lots was the line established and marked by Libbey and Bertelson, that they have claimed up to that line for much more than the statutory period, and that their possession has been open, notorious, exclusive, adverse, and under claim of right."

And in *McCormick v. Sorenson*, 58 Wash. 107, 107 Pac. 1055, we said:

"While it is true that Taylor originally made a mistake in fixing the lines, and by reason thereof unintentionally entered into the possession of lot 3 and part of lot 4, it is nevertheless apparent from the evidence that his possession thus obtained was immediately followed by a claim of right to the land. . . . These acts, which continued without interruption for a period of more than ten years, and until the commencement of this action, certainly evinced an assertion of permanent proprietorship on the part of respondents and all of their grantors, back to and including Taylor, . . ."

The rule of these cases is decisive of the question presented in this case.

The judgment must therefore be affirmed.

RUDKIN, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

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[No. 8920. Department One. November 26, 1910.]

ARTHUR S. BURR, *Appellant*, v. GEORGE DYER *et al.*,
Respondents.¹

PARTNERSHIP—REPRESENTATION—DEED OF REAL ESTATE. One partner alone cannot deed partnership real estate.

VENDOR AND PURCHASER—BONA FIDE PURCHASER—RECORDS—CHAIN OF TITLE. A purchaser without notice may rely on the record chain of title.

SAME—RECITALS. Where one partner in a real estate firm had undertaken to convey the whole title to partnership property to grantees paying for the same, a quitclaim and release between the partners, whereby the other partner agreed to deliver deeds to all third parties entitled thereto, duly recorded, is part of the record chain of title of the lots in question, so as to be notice to subsequent purchasers of the equities of the first grantees, where it recited that the lands referred to were more particularly described in quitclaim deeds of a specified date, and comprise all lands known to be covered by conditional sale contracts in which the partners appear as parties of the first part for which proper deeds had not been given (RUDKIN, C. J., and GOSE, J., dissenting).

Appeal from a judgment of the superior court for King county, Main, J., entered January 8, 1910, upon findings in favor of the defendants, quieting their title, in an action brought for partition. Affirmed.

T. Howard Shelley and *J. W. Russell*, for appellant.
Guie & Guie, for respondents.

MOUNT, J.—The appellant brought three actions for a partition of certain real estate, alleging that he was the owner of an undivided one-half interest therein. The respondents denied the ownership in the plaintiff, alleged ownership in themselves, and prayed to have their title quieted. While the cases involved different pieces of real estate, the facts in all are substantially the same. The actions were consolidated and tried as one case. The court found in favor of the de-

¹Reported in 111 Pac. 866.

fendants, and entered a decree quieting their title. The plaintiff has appealed.

It appears that O. E. Kenyon and H. H. McCord were co-partners in the business of buying and selling real estate in Seattle, from the years 1903 to 1906 inclusive. About February 11, 1903, the Washington National Bank of Seattle, being the owner, conveyed the property in question to said O. E. Kenyon and H. H. McCord. This property was located in "State Park Addition to Seattle." Soon thereafter both Kenyon and McCord went to Roslyn, in Kittitas county, and offered the lots for sale. Some were sold on contract and others for cash. Respondents purchased certain of the lots thus offered by the two partners, who personally conducted the sale. McCord and wife afterwards executed warranty deeds, purporting to convey the whole interest in the lots to the grantees. Thereafter, in the year 1906, certain quitclaim deeds conveying the real estate involved were made by H. McCord and wife to O. E. Kenyon; and afterwards, on September 18, 1906, Kenyon and McCord entered into a release as follows:

"O. E. Kenyon to H. H. McCord. Release.

"Whereas, the undersigned, O. E. Kenyon of Seattle, Washington, and H. H. McCord now of Los Angeles, California, were formerly copartners, engaged in the business of buying and selling real estate for profit, under the firm name and style of McCord & Kenyon, and the sale of real property by said McCord & Kenyon having been made largely on the deferred payment plan, and many of the transactions at this date now having been completed.

"And whereas, by certain quitclaim deeds, dated September 11th, A. D. 1906, the said H. H. McCord released and quitclaimed unto the said O. E. Kenyon any and all interest or estate in and to sundry descriptions of land in the following additions situated in King county, Washington, to wit: Wasson's Addition to Ravenna Park; Cumberland Addition to Seattle, State Park Addition to Seattle, Pontiac Addition to Seattle; Ravenna Springs Park Addition to Seattle, Riverside Addition to Seattle, and the Kelsey-Craig Five Acre Tracts. To all of said deeds of conveyance reference is hereby made for

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a more complete and full description of the land therein remised and quitclaimed in the county of King and state of Washington, and also the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the N $\frac{1}{2}$ of the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of section 10, township 23, north of range 2 east W. M., situated in Kitsap county, Washington.

"And whereas, the lands herein referred to and more particularly described in the said quitclaim deeds of September 11th, 1906, comprise and include all lands known to be covered by conditional sale contracts in which the said McCord & Kenyon appear as parties of the first part, and divers other parties appear as parties of the second part, and to which proper deeds of conveyance have not as yet been given.

"And whereas, the quitclaim deeds herein referred to have been made and delivered to the said O. E. Kenyon by the said McCord, for the purpose of enabling the said Kenyon to complete any and all the contracts of sale which the said firm of McCord & Kenyon has heretofore obligated itself to complete and also to enable said Kenyon to make and deliver proper deeds of conveyance to any of such third parties as may pay in full the principal and interest, the amounts due to the former firm of McCord & Kenyon.

"Now, therefore, in consideration of the conveyance herein referred to the said O. E. Kenyon covenants and agrees to make and deliver deeds of conveyance to such third parties as may be entitled to receive them, and the said O. E. Kenyon hereby releases and forever discharges the said H. H. McCord, his heirs, executors and administrators of and from any and all debts, claims and demands of whatever name or nature, and hereby covenants and agrees to relieve and hold blameless the said H. H. McCord from any and all liability arising out of any and all of the transactions connected with the sale or subsequent sales of the real property herein referred to, provided, however, that the said McCord will further execute a quit-claim deed to O. E. Kenyon to such further descriptions as should have been included in his deeds herein referred to, if by inadvertence omitted and which may not now be known to either of said parties.

"Witness my hand and seal this 18th day of September, 1906."

This instrument was duly signed and acknowledged, and was recorded in the records of deeds of King county on September 20, 1906. Afterwards on August 15, 1908, Mr.

Kenyon conveyed an undivided one-half interest in the lots in dispute to one L. W. Lewis. Mr. Lewis conveyed the same interest to J. L. Coman, and Mr. Coman conveyed to the appellant.

The controlling question in the case is whether the appellant is an innocent purchaser without notice of the claims of the respondents. It is no doubt the rule, as argued by the appellant, that one partner may not convey away the interest of another partner in real estate, and that a purchaser without notice of existing equities may rely upon the record chain of title, and is not bound to go outside the record to inquire for such equity. In this case, however, the release above quoted is a part of the record chain of title of the lots in controversy. The lots are referred to therein, and it is there stated:

"And whereas the lands herein referred to and more particularly described in the said quitclaim deeds of September 11th, 1906, comprise and include all lands known to be covered by conditional sale contracts in which the said McCord and Kenyon appear as parties of the first part, and divers other parties appear as parties of the second part, and to which proper deeds of conveyance have not yet been given."

We think the lower court was right in concluding that this was sufficient to put subsequent purchasers of these lots upon notice, especially where the record shows that the whole interest in the lots in question was attempted to be conveyed by one of the partners.

The judgment must therefore be affirmed.

PARKER and FULLERTON, JJ., concur.

RUDKIN, C. J. (dissenting).—The release referred to in the majority opinion does not include the property in controversy here and for that reason is not constructive notice to subsequent purchasers of the particular property. I therefore dissent.

GOSE, J., concurs with RUDKIN, C. J.

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Opinion Per MOUNT, J.

[No. 8986. Department One. November 26, 1910.]

ALICE HERRETT, *Respondent*, v. ATHELTON U. HERRETT,
Appellant.¹

HUSBAND AND WIFE—SEPARATE MAINTENANCE—ABANDONMENT—EVIDENCE—SUFFICIENCY. An abandonment of a wife is shown where, although the parties continued to live in the same house, the husband refused to treat her as his wife, or converse with her, or allow her credit for necessities, and insisted upon her getting a divorce.

SAME—NONSUPPORT—EVIDENCE—SUFFICIENCY. The evidence justifies a decree for separate maintenance, although the husband allowed the wife to live in the same house and provided groceries and paid laundry and doctor's bills, where he had abandoned her, refused her credit for clothing, and by his treatment sought to force her to obtain a divorce.

SAME—ALLOWANCE—AMOUNT. Separate maintenance in the sum of \$50 per month, \$220 for money borrowed, and \$75 attorney's fees, is justified, where the community property was valued at \$30,000.

Appeal from a judgment of the superior court for King county, Main, J., entered March 12, 1910, upon findings in favor of the plaintiff, in an action for separate maintenance. Affirmed.

Thomas B. MacMahon, for appellant.

Smith & Cole, for respondent.

MOUNT, J.—This action was brought by the respondent for separate maintenance. After issues were joined, the court upon the trial of the case entered a decree requiring the defendant to pay the plaintiff \$50 per month for her separate personal maintenance, the sum of \$220 money borrowed by her, and \$75 for attorney's fees herein. The defendant has appealed from the decree.

The appellant seeks a reversal upon two grounds, viz., that the complaint does not state a cause of action, and that the evidence is insufficient to support the decree. The complaint

¹Reported in 111 Pac. 367.

alleges, in substance, that the parties were married in the year 1895; that there were born to them five children, the youngest being two and the oldest twelve years of age at the time the action was begun; that the parties lived together harmoniously till about a year prior to the commencement of the action, when plaintiff by reason of ill health was obliged to, and did, with her husband's consent, leave her home for a short time to restore her health; that while absent the defendant caused to be communicated to her his desire that she should not return home, as his affections for her had abated; that she thereupon returned to her home at once; that defendant's attitude and demeanor thereafter were indifference and neglect towards her, and finally a refusal to extend to her the ordinary care and courtesies of a husband; that for a year prior to the commencement of the action, the parties, while residing in the same house, had not cohabited, and for more than three months the defendant had not addressed plaintiff, had refused to converse with her, had repeatedly urged her to secure a divorce from him, and that he had refused to give her the means for providing for herself the comforts and necessities of life, and had refused her credit with merchants for her personal needs, and that she had been obliged to borrow money with which to provide for her personal needs; that by reason of his conduct, her health has become impaired, and she is in distress; that during all the time the plaintiff was a faithful wife attending to her household duties, and the husband was a successful merchant with ample means to provide comfortably for the plaintiff.

The appellant conceded that the rule is established in this state by the decisions in *Kimble v. Kimble*, 17 Wash. 75, 49 Pac. 216; *Branscheid v. Branscheid*, 27 Wash. 368, 67 Pac. 812; *Schonborn v. Schonborn*, 27 Wash. 421, 67 Pac. 987, and *Bond v. Bond*, 45 Wash. 511, 88 Pac. 943; "that courts have jurisdiction to grant separate maintenance to the wife without divorce. To maintain the action, it is sufficient for the complaint and the facts to show an abandonment without

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cause, and a neglect or refusal on the part of the husband, having ability, to support his wife, or such neglect as amounts to refusal." *Schonborn v. Schonborn, supra*.

But it is contended that the complaint shows that the parties are still living together. Upon that theory, a long argument is made that the court has no jurisdiction to award separate maintenance. If the contention were correct that the complaint shows that the parties were still living together as man and wife, there would be much force in the argument of counsel. But the complaint and the proof in support thereof show that, while the parties were and are still living in the same house, they are not and have not lived together as man and wife for more than a year; and for three months prior to the suit, the appellant had even refused to converse with the respondent, and had refused her credit for clothing, etc.; that while living in the same house, they were actually separated as much as if they lived in different houses or in different communities. The complaint shows, and the allegations are fully supported by the evidence, that the appellant actually abandoned the respondent and refused to treat her as his wife, although he permitted her to remain in the same house where he lived; and as accentuating the abandonment, he insisted that she should obtain a divorce from him. These allegations of the complaint are clearly sufficient to show an abandonment of the respondent by the appellant.

It is next urged that the evidence is insufficient to justify separate maintenance, because the respondent testified that the appellant has provided groceries and paid for the laundry and medicines and doctor's bills, and bills of that character. But it was shown conclusively that the appellant does not live with the respondent as his wife, and does not intend to do so; that he had made numerous requests for her to get a divorce; that he had refused her credit for clothing and had notified merchants not to give her credit. The evident purpose of the appellant was to abandon his wife while apparently

living with her in the same house, and thus by such treatment force her to obtain a divorce. This she refused to do. It is as much the duty of the husband to supply his wife with clothing befitting her station in life as it is to furnish her with groceries and such like. The evidence shows, and the court found, that the property was of the value of \$30,000. It was all community property. We think the evidence was ample to justify the court in awarding the respondent \$50 per month for her personal maintenance, and also the other allowances which were made.

The judgment is therefore affirmed.

RUDKIN, C. J., GOSE, FULLERTON, and PARKER, JJ., concur.

[No. 8772. Department Two. November 26, 1910.]

FRANCES KNISELL, *Appellant*, v. ALBERT BRUNET *et al.*,
Respondents.¹

APPEAL—FINAL ORDERS—DETERMINING ACTION. An order staying the foreclosure of a mortgage, upon tender of the installment of interest due, is appealable as an order in effect determining the action and preventing final judgment therein, within Rem. & Bal. Code, § 1716, subd. 6.

MORTGAGES—FORECLOSURE—STAY—STATUTES. Rem. & Bal. Code, § 1126, providing for a stay of the foreclosure of a mortgage upon which there shall be due any interest or installment of the principal and there are other installments not due, if tender of sums due and costs are paid, does not apply where, by reason of default or breach, the mortgagor has declared the whole principal sum due, in accordance with the provisions of the mortgage; since such provisions are valid and must be given force, and consequently no other installments are *not due*.

Appeal from an order of the superior court for King county, Gilliam, J., entered March 23, 1910, granting a stay of proceedings in an action for the foreclosure of a mortgage, upon tender and application of the defendants. Reversed.

¹Reported in 111 Pac. 894.

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Harrison Bostwick and Frank A. Steele, for appellant.

Wm. Martin and Julius L. Baldwin, for respondents.

RUDKIN, C. J.—On the 9th day of May, 1908, the defendants Harry S. Huckle and wife executed and delivered to the plaintiff their certain coupon note, for the sum of \$1,800, payable three years after date, with interest at the rate of 7% per annum, payable semi-annually on the first day of May and November of each year. The interest was represented by six coupon notes attached to the principal note. The notes were made payable at the office of Harrison Bostwick, in the city of Seattle, and the principal note contained the following stipulation on the part of the makers:

“It is further expressly agreed, that if default be made in the payment of any interest note, or any portion thereof, after the same becomes due and payable at the time and place aforesaid, then the said principal sum and all accrued interest shall, at the option of the legal holders thereof, thereupon, and without further notice become due and payable, and if suit shall be brought to collect the principal and interest we promise to pay the additional sum of ten (10%) per cent. on the amount due, as attorney’s fees in said suit. This note is secured by a first mortgage upon real property in the county of King, state of Washington, and if after the sale of said mortgaged property any balance remains due on this note we consent to a deficiency judgment therefor.”

At the same time, and as a part of the same transaction, the makers of the note executed and delivered to the payee their certain indenture of mortgage on real property in the city of Seattle to secure the payment of the principal note and coupons according to their terms. The mortgage likewise contained the following stipulation on the part of the mortgagors:

“And it is hereby stipulated and agreed, that in case of failure to pay said notes or indebtedness hereby secured, or interest thereon or any part thereof as and when the same shall become due and payable at the time and in the manner above specified for the payment thereof; or in case of waste

or nonpayment of taxes or assessments on said premises, or a breach of any of the covenants or agreements herein contained, then in such case the whole of said principal sum and interest secured by the said mortgagors' promissory note in this mortgage mentioned shall thereupon at the option of said mortgagee become immediately due and payable without notice thereof to the mortgagors, their heirs, executors, administrators or assigns."

The mortgage was filed for record; and thereafter the defendants Albert Brunet and wife purchased the mortgaged premises, subject to the mortgage, and assumed the mortgage debt as a part of the purchase price. The interest or coupon note falling due on the 1st day of November, 1909, was not paid at maturity, and the plaintiff thereupon elected to declare the whole sum due, both principal and interest, and instituted the present action to foreclose the mortgage. The Brunets appeared in the action, tendered the accrued interest with costs, and prayed for an order staying further proceedings, pursuant to Rem. & Bal. Code, § 1126, which provides as follows:

"Whenever a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest or installment of the principal, and there are other installments not due, if the defendant pay into the court the principal and interest due, with costs, at any time before the final judgment, proceedings thereon shall be stayed, subject to be enforced upon a subsequent default in the payment of any installment of the principal or interest thereafter becoming due. In the final judgment, the court shall direct at what time and upon what default any subsequent execution shall issue."

The court granted the stay of proceedings as prayed, and from this order the plaintiff has appealed.

A motion interposed by the respondents to dismiss the appeal on the ground that the order is not final was heretofore denied by this court, without an opinion, for the reason that the order in effect determined the action and prevented

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a final judgment therein, within the meaning of Rem. & Bal. Code, § 1716, subd. 6. *Bennett v. Stevenson*, 53 N. Y. 508.

From the foregoing statement, it will be seen that the construction of section 1126 *supra*, as applied to a note and mortgage of this kind, is the only question presented for our consideration. At the present day, nearly all notes and mortgages contain a provision under which the right to foreclose accrues upon the breach of any one of numerous stipulations on the part of the mortgagor, such as an agreement to pay interest, taxes, procure insurance, etc. Such stipulations are not looked upon as penalties, but rather as agreements fixing the maturity of the debt, and are enforceable according to their terms. 2 Jones, Mortgages (6th ed.), §§ 1180-81; Wiltsie, Mortgage Foreclosure, § 41.

The debtor and creditor have a right to agree that the debt shall become due and payable on the happening of any lawful contingency, such as the nonpayment of interest or taxes, and it is the duty of the courts to enforce their agreement as made. And if the statute under consideration is to receive the construction placed upon it by the court below, it seriously impairs and curtails the right of private contract, and is of very doubtful validity. But we are satisfied that such a construction is neither called for nor authorized. This section is simply declaratory of the old chancery practice, where an action was brought to foreclose a mortgage given to secure a debt payable in installments. In such cases the court would retain jurisdiction of the cause, even though the amount due was tendered or paid, and decree a further sale as subsequent installments became due, in order to avoid a multiplicity of suits. 2 Jones, Mortgages, § 1181, *supra*. Similar statutes exist in other states, though some of them, at least, provide that the action shall be dismissed upon the payment of the installments due, with costs, instead of providing for a stay of proceedings, as with us. 3 Fay, Digest of the Laws of New York, page 407, § 161; Bel. & Cot. Codes and Statutes of Oregon, §§ 430, 431.

The statute in question in terms only applies where there are other installments *not due*, and such is not this case; for, by the express terms of the note and mortgage in suit, the entire sum has become due and payable—not only due and payable for the purposes of foreclosure, but due and payable for all purposes. *Noell v. Gains*, 68 Mo. 649; *Wheeler & Wilson Mfg. Co. v. Howard*, 28 Fed. 741.

In *Bennett v. Stevenson*, *supra*, the court of appeals of New York reversed a similar stay order, notwithstanding their statute provided that: "Whenever a bill shall be filed for the satisfaction or foreclosure of any mortgage, upon which there shall be due any interest, or any portion or installment of the principal, and there shall be other portions or installments to become due subsequently, the bill shall be dismissed, upon the defendant's bringing into court, at any time before the decree of sale, the principal and interest due, with costs." Fay, Digest of the Laws of New York, p. 407, § 161, *supra*. To the same effect see: *Malcolm v. Allen*, 49 N. Y. 448.

For these reasons, we are of opinion that the court erred in granting the stay; and the order is accordingly reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CHADWICK, MORRIS, CROW, and DUNBAR, JJ., concur.

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Citations of Counsel.

[No. 8861. Department Two. November 26, 1910.]

C. S. ROBINSON, *Respondent*, v. CLARENCE E. HILL,
Appellant.¹

MASTER AND SERVANT—INDEPENDENT CONTRACTORS—EVIDENCE OF RELATION—ADMISSIBILITY. In an action for personal injuries, upon an issue as to whether the defendant employed the plaintiff or was only the lessor of the mill, evidence is admissible of conversations had with the defendant relative to a settlement of a prior accident with a casualty company at defendant's suggestion, and as to defendant's taking out casualty insurance covering accidents to the men.

MASTER AND SERVANT—INDEPENDENT CONTRACTOR—QUESTION FOR JURY. In an action for personal injuries, a question as to the existence of a contract between the defendant and a third person making such third person an independent contractor, upon disputed evidence, is one of fact for the jury.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered November 12, 1909, upon the verdict of a jury rendered in favor of the plaintiff in an action for personal injuries. Affirmed.

Robert M. Davis and *Fred W. Llewellyn*, for appellant, contended, among other things, that evidence of the settlement of the prior accident was inadmissible to show the relation of master and servant. *Smith v. Belshaw*, 89 Cal. 427, 26 Pac. 834; *Johnson v. Owen*, 33 Iowa 512. The construction of the contract was for the court. 11 Ency. Plead. & Prac., 88, 89; *Smith v. Humphreyville*, 47 Tex. Civ. App. 140, 104 S. W. 495; *Anderson v. Tug River Coal & Coke Co.*, 59 W. Va. 301, 53 S. E. 713; *Drennen v. Smith*, 115 Ala. 396, 22 South. 442; Moll, Independent Contractors and Employers Liability, 62. There was no sufficient evidence that plaintiff was the servant of the defendant. 16 Am. & Eng. Ency. Law (2d ed.), 187, 188; *Barclay v. Puget Sound Lumber Co.*, 48 Wash. 241, 93 Pac. 430, 16 L. R. A. (N. S.) 140; *Larson v. American Bridge Co.*, 42 Wash. 224, 82 Pac. 294, 111 Am. St. 904;

¹Reported in 111 Pac. 871.

Engler v. Seattle, 40 Wash. 72, 82 Pac. 136; *State v. Emerson*, 72 Me. 455; *Kelleher v. Schmitt & Henry Mfg. Co.*, 122 Iowa 635, 98 N. W. 482; *Humpton v. Unterkircher*, 97 Iowa 509, 66 N. W. 776; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Uppington v. New York*, 165 N. Y. 222, 59 N. E. 91, 53 L. R. A. 550; 2 Street, Foundation of Legal Liability, 468; 1 Pollock, Torts (6th ed.), 78; Moll, Independent Contractors and Employers Liability, 31; *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 99 Am. St. 879, 65 L. R. A. 445; *Good v. Johnson*, 38 Colo. 440, 88 Pac. 439, 8 L. R. A. (N. S.) 896. The principles governing the trial court in determining an application for a new trial are not altered by the fact that one new trial had already been granted on the same ground. *Railroad v. Green*, 100 Tenn. 238, 47 S. W. 221; *Champion Ice Mfg. & Cold Storage Co. v. Delsignore & Bro.*, 32 Ky. Law 427, 105 S. W. 1181; *Stanberry v. Moore*, 56 Ill. 472; *Judah v. Trustees of Vincennes University*, 23 Ind. 272; *Humbert v. Eckert*, 7 Mo. 259; *Garnett v. Kirkman*, 33 Miss. 389; *Morris v. Warick*, 42 Wash. 480, 85 Pac. 42; *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108; *Clark v. Jenkins*, 162 Mass. 397, 38 N. E. 974; *Graham v. Consolidated Traction Co.*, 64 N. J. L. 10, 44 Atl. 964; *Jourdan v. Reed*, 1 Iowa 135; *Wright v. Southern Express Co.*, 80 Fed. 85; *Morse v. St. Paul Fire & Marine Ins. Co.*, 129 Fed. 233; *Wilkie v. Roosevelt*, 3 Johns. Cas. 206, 2 Am. Dec. 149; *Taylor v. Central R. & Banking Co.*, 79 Ga. 330, 5 S. E. 114; *Vickery v. Central R. & Banking Co.*, 89 Ga. 365, 15 S. E. 464; *Moseley v. Rambo*, 106 Ga. 597, 32 S. E. 638.

Govnor Teats, *Hugo Metzler*, and *Leo Teats*, for respondent.

MORRIS, J.—Respondent brought this action to recover damages for injuries sustained while employed in a shingle mill at Edgewood. The complaint alleged that the appellant

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was the owner of the mill and the master of respondent. The answer denied that appellant was the master of respondent, and alleged that, as owner of the mill, he had entered into a verbal contract with one J. R. Pineo, whereby Pineo leased the mill, employed and discharged all help, kept the machinery in repair, paid all bills for labor and materials, manufactured all shingles at the mill, and loaded them on cars for shipment, for the sum of sixty cents per thousand, the appellant furnishing the bolts. Other defenses were pleaded, but they are not involved in the question before us. Respondent denied that Pineo was an independent contractor, and upon these issues the case went to the jury, resulting in verdict and judgment for respondent, from which this appeal is taken.

The main errors relied upon for a reversal are in the admission of testimony. It appears that respondent was injured in the same mill the spring before he received his present injury, and he was permitted to introduce evidence of conversations had with appellant relative to a settlement, and of the settlement with the casualty company at appellant's suggestion. This was competent upon the issue as to whether appellant was or was not the master of respondent. Evidence was also introduced of the taking out of casualty insurance covering accidents to the men at work in the mill. This was admissible upon the same issue as to whether appellant or Pineo was the employer and master of respondent. It is true this court has, in a number of cases, held it to be error to inject into the case the fact that a defendant in a personal injury suit is protected by insurance of this character, and such is the undoubted law; but here was a sharp conflict between the parties as to who was running the mill at the time of the accident and who, if either, as between appellant and Pineo, was to respond for the injuries sustained by respondent. Any evidence touching this issue was admissible, and it was competent to show, as an admission by appellant of his liability, that he had previously taken out insurance to

protect himself from the very thing which had happened. The admission of this evidence was carefully guarded by the court, and the jury instructed to consider it for no other purpose. Under such circumstances, there was no error.

Appellant next contends that the evidence clearly establishes that Pineo was running the mill at the time of the accident as an independent contractor, and that the court should have so held upon his motions for a directed verdict and for new trial. There was evidence strongly supporting such contention, and the court below seems to have been impressed with its truth, as upon this ground he had previously granted appellant a new trial upon this same cause of action. But this was a question of fact for the jury; and though the court may have found otherwise had the fact been submitted to him, he could not, for this reason, usurp the function of the jury and override their verdict because he differed with them as to some of the facts, where there was evidence to justify the verdict as returned by the jury. It is true the construction of contracts is a question of law for the court and not of fact for the jury, but here was no question of construction or interpretation of contract. The question submitted to the jury was as to the existence of the contract as alleged by appellant. There was no dispute as to its terms and no controverted interpretation for the court. The question was, did it exist. All the questions complained of by appellant were in the proper submission of disputed questions of fact to the jury, and we find no error.

The judgment is affirmed.

RUDKIN, C. J., CROW, DUNBAR, and CHADWICK, JJ., concur.

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[No. 9076. Department Two. November 26, 1910.]

W. H. McPHEE, *Appellant*, v. AUGUSTA NIDA, *Respondent*.¹

ACTIONS—COMMENCEMENT—WHAT CONSTITUTES. The commencement of an action requires both the filing of a complaint and commencement of service of summons within ninety days, under Rem. & Bal. Code, § 220, providing that an action shall be commenced by the service of summons or by filing a complaint, provided that service shall be made personally or by publication commenced within ninety days after the complaint is filed.

ACTIONS—COMMENCEMENT—LOSS OF JURISDICTION—NEW ACTION. The loss of tentative jurisdiction by failure to serve a summons within ninety days after the filing of a complaint, does not prevent the commencement of a new action by subsequently serving the same summons and complaint.

Appeal from an order of the superior court for King county, Gay, J., entered May 19, 1910, quashing the service of summons upon motion of the defendant. Reversed.

William Martin, for appellant.

E. L. Rinehart, for respondent.

CHADWICK, J.—On the 12th day of September, 1905, plaintiff filed a complaint and summons against the defendant in King county. An effort was made to obtain service, but it was not accomplished until the 7th day of March, 1910. On the 17th day of March, defendant appeared and filed a general demurrer, setting up that the complaint did not state facts sufficient to constitute a cause of action, and that the action had not been begun within the time required by law. Leave being granted, another demurrer was filed on the 9th day of April. On April 23, a motion was made requiring plaintiff to file his original summons and complaint.

On April 30, defendant asked leave to withdraw her demurrers, and the privilege of entering a special appearance for the purpose of making a motion to quash the service of

¹Reported in 111 Pac. 1049.

summons. This motion was accompanied by an affidavit made on behalf of the defendant by her attorney. It is stated therein that "affiant had no means of ascertaining that plaintiff proposed to rely upon the complaint filed on the 12th of September, 1905, until he appeared in court on the day set for hearing of argument on the demurrer." The motion to compel plaintiff to file the original summons and complaint was denied, but the court allowed the demurrers to be withdrawn, and entertained a motion to quash the service of summons, holding that "the complaint was filed herein on the 12th day of September, 1905, and no service of summons was had upon defendant until the 7th day of March, 1910, and no service of summons by publication was ever commenced after said complaint was filed." From this order plaintiff has appealed.

Appellant insists that, respondent having made a general appearance by her two demurrers, she could not thereafter be heard to question the jurisdiction of the court; and that, respondent having filed two demurrers and also having asked affirmative relief, the court could not allow her to withdraw her general appearance and file a special appearance without abusing its discretion. On the other hand, respondent insists that the right to withdraw a general appearance is purely discretionary; that the court had not acquired jurisdiction of the defendant, and that such jurisdiction could not be conferred by consent or by the conduct of the parties. Our view of the law of the case compels us to abandon, to a certain extent at least, the theories of both parties, and to rest our decision upon our own reasoning.

Rem. & Bal. Code, § 220, provides:

"Civil actions in the several superior courts of this state shall be commenced by the service of a summons as hereinafter provided, or by filing a complaint with the clerk as clerk of the court; provided, that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served

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personally or commence service by publication within ninety days from the date of filing the complaint."

In *Deming Inv. Co. v. Ely*, 21 Wash. 102, 57 Pac. 353, this statute was construed as follows:

"The act of filing the complaint and the commencement of service by publication must both exist before the action is commenced, and the limitation of time in the commencement of service by publication of ninety days is mandatory."

In *Fuhrman v. Power*, 43 Wash. 533, 86 Pac. 940, where service had been postponed beyond the period prescribed by the statute, the court said:

"There was therefore no service upon which judgment could have been rendered. . . . That appellant really commenced no action within the statutory period is, therefore, apparent. . . ."

It follows that the action was not commenced, nor did the court acquire jurisdiction by the filing of the complaint in September, 1905. An action may be begun by filing a complaint or by service of the complaint and summons; but if the complaint is filed, the tentative jurisdiction of the court is lost unless service is made within ninety days. The act of filing becomes a nullity.

But a party does not for these reasons lose his cause of action or his right to serve a complaint and summons at a subsequent time. If service is made thereafter, the commencement of the action must be dated from the service, and cannot be made to relate back to the time of the filing by the appearance of the party defendant. So in this case, appellant having served a complaint and summons on March 10, 1910, he is not to be turned out of court because service was not made within ninety days after September 25, 1905, nor can he claim any rights because of the original filing. His right to invoke the jurisdiction of the court, and the only right he has, comes from the statute; that is, to begin a new action by filing or serving a complaint. He has done the latter. A

case, not the case attempted to be begun, but the one commenced March 7th, 1910, was before the court.

From these observations it will be apparent that the trial court should not have allowed the appearances to be withdrawn for the purpose of making a motion to quash the service, and that his ruling based upon the original filing of the complaint was erroneous; albeit the rule was made for the just reason that failure to serve the first complaint within ninety days worked a loss of jurisdiction of the court.

The case will be remanded for further proceedings in accordance with this opinion.

RUDKIN, C. J., MORRIS, CROW, and DUNBAR, JJ., concur.

[No. 8978. Department Two. November 26, 1910.]

CECIL THORNTON, *by his Guardian ad litem Frank Thornton, Respondent*, v. MATTHEW DOW *et al.*,
Appellants.¹

APPEAL—REVIEW—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS CURED BY VERDICT. The failure of a jury to follow, in making a special finding, an erroneous instruction of the court is not prejudicial error, where the record upon the whole case shows that the verdict was right, and no other verdict could have been rendered on proper instructions.

TRIAL—FINDINGS—CONSTRUCTION—NUISANCES. A finding that a railing around a balcony in a public building was a nuisance at the time of the accident, at which time a great crowd was pressing upon it, has the effect of finding that it was a nuisance at the time it was completed, it being in the same condition at both times.

NUISANCES—DEFINITIONS. The general definition of "nuisance" is comprehensive enough to include almost all wrongs interfering in any way with personal rights of every kind.

NUISANCES—CLASSIFICATION—BUILDING. An insufficient balcony rail in a public building does not belong to the class of nuisances embraced within things of a noxious or dangerous kind or dangerous within itself.

¹Reported in 111 Pac. 899.

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Citations of Counsel.

NUISANCE—INSUFFICIENT STRUCTURE—LIABILITY OF CONTRACTOR TO PUBLIC—CAUSAL CONNECTION. There is no causal connection between a spectator at a public entertainment, injured by the giving way of a balcony rail, and the contractor who constructed the railing, which could render the contractor liable for the creation of a nuisance; especially where the contractor was free from negligence and constructed the rail according to plans and specifications.

NEGLIGENCE—INSUFFICIENT STRUCTURE—CONTRACTORS—LIABILITY TO PUBLIC. A contractor, constructing a balcony railing without plans and specifications therefor, which the contract gave him the right to demand, is not therefore liable for an insufficiency in the railing, where the work was done upon consultation with, and under the direction of, the architect, and the architect testified that the building was completed in every respect according to the specifications.

SAME—ACCEPTANCE BY OWNER—NUISANCE. A contractor is not liable as for a nuisance for insufficiency in a balcony rail, where he has lived up to the "law of the building," and has not been guilty of negligence, and the building has been accepted and taken over by the owner for use.

NEGLIGENCE—INSUFFICIENT STRUCTURES—LIABILITY OF CONTRACTOR—ACCEPTANCE BY OWNER. Technical omissions in the acceptance of a state armory from the contractor will not render the contractor liable for an injury to a spectator in the building, on the ground of illegality in the manner of acceptance, where the building had been passed upon and received by the proper official and was in the possession of the state, and was leased for a public entertainment, the injured party being present at the invitation of the state or its lessee.

APPEAL—DECISION—REMAND. Upon reversing an order granting a new trial on one specified ground, without passing upon other grounds, the case will be remanded with directions to pass upon the other grounds of the motion.

Appeal from an order of the superior court for King county, Robert H. Lindsay, Esq., judge *pro tempore*, entered April 7, 1910, granting a new trial, after a special verdict of a jury rendered in favor of the defendants, in an action for personal injuries sustained by a spectator through the negligence of a contractor in constructing a public building. Reversed.

Shank & Smith, for appellants, contended, among other things, that the party injured must look to the person inviting him, namely the tenant. *Whitmore v. Orono Pulp &*

Paper Co., 91 Me. 297, 39 Atl. 1032, 64 Am. St. 229, 40 L. R. A. 377; *Johnson v. Tacoma Cedar Lumber Co.*, 3 Wash. 722, 29 Pac. 451; *Ward v. Hinkleman*, 37 Wash. 375, 79 Pac. 956; *Baker v. Moeller*, 52 Wash. 605, 101 Pac. 231. A contractor is liable only for his own negligence or improper construction prior to completion and acceptance. *Cooley, Torts* (1st ed.), 548; 16 Am. & Eng. Ency. Law (2d ed.), 209; 6 Cyc. 60-62; *Pearson v. Zable*, 78 Ky. 170; *Lawrence v. Shipman*, 39 Conn. 586; *Church of the Holy Communion v. Paterson Extension R. Co.*, 68 N. J. L. 399, 53 Atl. 449; *Board of Comrs of Cloud County v. Vickers*, 62 Kan. 25, 61 Pac. 391; *Pye v. Faxon*, 156 Mass. 471, 31 N. E. 640; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327; *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Lancaster v. Connecticut Mut. Life Ins. Co.*, 92 Mo. 460, 5 S. W. 23, 1 Am. St. 739; *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405, 41 N. W. 490; *First Presbyterian Congregation v. Smith*, 163 Pa. 561, 30 Atl. 279, 43 Am. St. 808, 26 L. R. A. 504; *City of Louisville v. Shanahan*, 22 Ky. Law 163, 56 S. W. 808; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174, 33 Am. St. 39; *Morgan v. Bowman*, 22 Mo. 538; *Horner v. Nicholson*, 56 Mo. 220. After a contractor has completed his contract, and the owner has accepted possession of the building, the owner assumes to the public and to third parties the responsibility for any injuries which result from the use or occupancy of the building or structure, whether due to the contractor's negligence, or to imperfect plans and specifications, and the contractor is not liable to any one. 16 Am. & Eng. Ency. Law (2d ed.), 209; 6 Cyc. 60-62; *Curtin v. Somerset*, 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. 220, 12 L. R. A. 322; *Albany v. Cunliff*, 2 Coms. (N. Y.) 165; *Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457, 57 Am. St. 204, 32 L. R. A. 837; *Salliotte v. King Bridge Co.*, 122 Fed. 378; *Galbraith v. Illinois Steel Co.*, 133 Fed. 485; *McCaffrey v. Mossberg & Granville Mfg. Co.*, 23 R. I. 381, 50 Atl. 651, 91 Am. St. 637, 55 L. R. A. 822;

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Fanjoy v. Seales, 29 Cal. 244; Wharton, Law of Negligence (2d ed.), 439; *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Washington Bridge Co. v. Land & River Imp. Co.*, 12 Wash. 272, 40 Pac. 982. Before a person can be held liable for negligence as to the condition of a building he must be either the owner of the building or have jurisdiction and control over the condition which causes the injuries. 21 Am. & Eng. Ency. Law (2d ed.), 467; *Collier v. Great Northern R. Co.*, 40 Wash. 639, 82 Pac. 935; *Knottnerus v. North Park St. R. Co.*, 93 Mich. 348, 53 N. W. 529, 17 L. R. A. 726; *Long v. John Stephenson Co.*, 73 N. J. L. 186, 63 Atl. 910.

Reynolds, Ballinger & Hutson, for respondent.

DUNBAR, J.—This is an action for personal injuries sustained by the plaintiff, against the defendants as contractors, who built the present state armory building for the state of Washington, in the city of Seattle. The plaintiff alleged negligence in the construction of a balcony railing, constructed in such a way as to render the same dangerous; that it was dangerous, and that by reason of its frailty the plaintiff and others, while witnessing an athletic meet, were precipitated over the balcony railing and were injured. The defense was, that the building was constructed in accordance with the plans and specifications; that prior to the date of the accident (which was May 6, 1909) the building had been turned over to the state through its agents; that the state had taken absolute possession of the building, and that the defendants had nothing whatever to do with giving or permitting the athletic entertainment at which the accident occurred. These were, in substance, the issues presented.

The case was tried by a jury, who returned a verdict in favor of defendants. A motion for a new trial was interposed, and was granted because, in the opinion of the court, the jury had disobeyed the instructions of the court in this:

The court defined a nuisance to the jury, and instructed the jury that, if they found that this structure was a nuisance from the beginning, the question of occupancy cut no figure in the case, and that the defendants would be liable as the creators of such nuisance; and in order to make this effective, the following question was propounded to the jury for answer:

"At the time of the occurrence of the accident in question in this case, was the railing around the balcony in the drill hall of the armory, and particularly was that part of the railing on the east side of the drill hall, a nuisance within the definition of a nuisance as contained in the instruction of the court?"

The jury answered this question in the affirmative, but also found for the defendants. Deeming this a refusal on the part of the jury to follow the instructions of the court, the motion for a new trial was sustained; and from the granting of such motion this appeal is taken.

It is the contention of the respondent that, inasmuch as the special verdict should control the general finding, and the general finding is inconsistent with the special verdict, the general finding was properly set aside; and that it is not within the province of this court to enter into an investigation of the correctness or incorrectness of the instructions given by the court to the jury, for the reason that the instructions, whether right or wrong, were the law of the case.

Counsel for respondent rely upon the case of *Pepperall v. City Park Transit Co.*, 15 Wash. 176, 45 Pac. 743, 46 Pac. 407, where, it must be confessed, this question was decided by this court in favor of such contention, and the doctrine announced that, although an instruction to the jury may have been wrongfully given, it was binding and conclusive upon the jury. This case was decided by a divided court, three judges concurring and two dissenting, and the case has been endorsed, in a measure, two or three times since. But it may not be amiss to say that it has been followed with some reluctance, and that this court, as since constituted, has not

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been satisfied with the rule there announced in its fullest application. In that opinion several cases were discussed by the court which undoubtedly sustain the conclusion reached, but there are other cases which hold to the contrary view; and it must conclusively appear that such a doctrine as this is opposed to the well-established rule, announced by this and other courts, that, when it affirmatively appears that an error is not prejudicial and could not have affected the result which was reached and which ought to have been reached, the commission of such an error would not warrant a reversal of the judgment. In this case, if this judgment should be reversed because the jury did not follow the erroneous instruction on the part of the court, and the case should be sent back for a retrial for that reason, the court being instructed to remedy the error by giving a proper instruction, and the case should be tried again and the same verdict rendered under such proper instruction, what benefit would accrue to either of the parties litigant? It is true that it is the duty of the judge under the provisions of the constitution and statutes to declare the law, but this is on the theory and on the supposition that the law will be declared correctly. While inconveniences may arise by reason of the failure of the jury to implicitly follow the instructions as given by the court, if it can be clearly seen that such instructions were wrong, and that a case would have to be reversed by this court if the jury had obeyed such instructions, thereby depriving the litigant of a legal right, it would seem idle to put him to the expense of another trial to obtain a right which he had lost without any fault of his own.

In *Thornburgh v. Mastin*, 93 N. C. 258, it was held that, when a jury correctly decides a question of law, incorrectly left to them by the court, the verdict cures the error. That is exactly the proposition here. If the jury had followed the erroneous instruction of the court, on appeal this court would have cured the error by a reversal of the judgment. But it would have necessitated a circuitry of action and addi-

tional expenses; and if we find, in the investigation of the case here, that the instruction was erroneous, but that it was not prejudicial because the jury cured it, it seems to us that this is the short and sensible way out of the difficulty, and is in accordance with the trend of modern authority generally, to the effect that a judgment will not be reversed if it conclusively appears that it was not prejudicial in its results. In Thompson on Trials, § 1020, it is said:

"If the judge submits a question of law to the jury and they decide it rightly, there is no ground of exception; since it would be absurd to reverse a judgment in order that the judge might decide what the jury rightly decided."

It is manifest that it would be just as absurd to reverse a judgment in order that the jury might bring in the same verdict under a different instruction. This is attaching more importance to the machinery of the law than to the law itself, and imposing unnecessary costs and delays upon litigants who are confessedly entitled to the judgments which are rendered. A judgment will not be reversed for intermediate errors, when the record upon the whole case shows it to be right on its merits. *Whitworth v. Ballard*, 56 Ind. 279.

It has been the uniform holding of this court that, where the whole record shows that no other judgment than the one that was rendered could properly be rendered, errors occurring during the trial become immaterial. A common instance is where a court renders a decision on some particular ground which is not tenable. In such case it has always been determined by this court that, if the judgment could be maintained on any ground, the reason assigned for the judgment or ruling would be immaterial. As was said in the case of *Kane v. Dawson*, 52 Wash. 411, 100 Pac. 837:

"The question before us is not whether the lower court arrived at a correct conclusion by an incorrect process of reasoning, but whether, considering all the evidence, its decision was the proper one to be entered;"

the object of courts, and especially of appellate courts, being

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to see that the litigants have obtained their legal rights, which in a broad sense means, not a right to every intermediate order or ruling which may occur in the trial of the cause, but an ultimate right to which they are entitled under the facts and the actual law in the case. In consideration of these views, we are constrained to overrule the case of *Pepperall v. City Park Transit Co.*, *supra*, and to hold in conformity with the general principles announced by this court that, where we find that the verdict of the jury is sustained by the law, the verdict cures the erroneous instruction, and the judgment will not be reversed.

This conclusion renders it necessary, then, to enter into a determination of the question whether the instructions of the court were right; and in order to do this, we must consider the nature of the structure, and the nature of the employment of the appellants. The Laws of 1907, p. 83, chapter 55 (Rem. & Bal. Code, § 3896 *et seq.*), make an appropriation and provide for the erection of a state armory building, for the use of the national guard in the city of Seattle; provide for a commission, of which the adjutant general and others shall be members; that the commission shall choose a suitable site for the armory building, shall obtain proper architectural design and plan and specifications and details in conformity with such plan and design, and secure the erection and completion of such armory building, conforming faithfully to such plan and design.

The contract for this building was let to the appellants. A meeting was held on the 16th of April, 1909, and an inspection of the building was made, after which, on motion, the armory building was accepted by the state, and final payment allowed. Some minor corrections were suggested, and were made before the casualty which was the cause of this accident. The final certificate of the architect was issued, and entire and complete possession was taken by the state on April 16, and it has since kept exclusive and absolute control.

General Lamping, as Adjutant General, after taking pos-

session of the building and before the falling of the railing, let independent contracts for lockers and for other minor particulars which were not included in the contract. He thereafter rented the armory building on one occasion to the May Festival, for a public entertainment, receiving substantial payment therefor, to wit, \$400. He rented the armory building to the Seattle Athletic Association for the athletic entertainment which was the occasion of the accident, receiving \$200 therefor. He has continued to rent the armory building, receiving all told the sum of \$2,800 therefor, which money has gone into the treasury of the state.

The drill hall in which the entertainment was held is two hundred feet long, by one hundred feet wide, and the railing goes around the entire balcony, which is ten or twelve feet high, the balcony containing three rows of seats around its entire length. As bearing upon the question of whether this construction was a nuisance *per se*, or such a nuisance as might be said to be dangerous within itself and which would reasonably be brought to the knowledge of the contractor as a nuisance *per se*, it becomes necessary to notice somewhat the manner in which this accident occurred.

On the evening on which this athletic association held its entertainment, there were different classes of entertainment, but the culminating feature was a ten-mile Marathon race. In this race four or five laps were run in the armory building, and then the course went into the open air around Lake Union, and back into the armory building for the closing laps. The contestants, coming back earlier than was expected, collided with a relay race which was in progress, and the leaders fell in a heap, which incident was somewhat exciting to the crowd. One of the leaders was a Seattle boy and the other was a Portland boy. The race was very close and was run in what might be termed, in race-horse parlance, "neck and neck," the Seattle boy being put forward by the Seattle club and the Portland boy being backed by the Portland club. According to the testimony, there was intense rivalry between the two

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clubs. The testimony shows that the wildest excitement prevailed at the finish of this contest, bringing vividly to mind the celebrated contest between Messala, the Roman, and Ben Hur, the Jew, so graphically described by General Lew Wallace. According to the testimony, after the men had left the armory and were completing their course, at various points word would be sent to the audience concerning their respective positions, and when the men finally on their return entered neck and neck, the excitement was at fever heat, the witness stating that it was the most exciting contest he had ever witnessed, and that he had witnessed a great many. His language is as follows:

"These men circled the hall five times, running neck and neck all the time, and the crowd was getting wilder naturally, with enthusiasm, at each circle of the hall; so at the very final—at the final dash, about fifty yards I should judge, straight away to the finish, these two men, just inches apart, the enthusiasm of the crowd broke over all bounds and they not only came down from—some of them came down from where they had been standing back under the balcony and they rushed clear across from the other side of the hall, and even people who were on the opposite side upon the balcony rushed—came down stairs all at once to see the finish of this very exciting race, so that they came rushing in from both sides of this narrow lane where the runners were to finish, and they rushing in from behind, that is, from the outside, on the floor, not under the balcony. The judges were stationed—one judge on the inside of the track, that is, under the balcony, and two of us on the other side, and several timers and a number of officials were there. And they rushed in and pressed this finish line back under the balcony; that is to say, in the finish the runners had to run closer under the balcony than they would on the lines originally laid out by the men who laid off the track, and it was necessary for several of us—we tried to hold the crowd back by forming a line with our hands, several gentlemen on this side of me and several on that side of me, we tried to hold them back, but it was impossible, they broke right through our arms—our locked hands—and swept over the floor. At the finish of the race—it was just about five or six yards from the finish, the men were, when this accident oc-

curred, they were within five or six yards of the finish, and the forcing of this finish line under the balcony upset all the plans to have the finish out in full sight so that the people upstairs in the back rows of the balcony were unable to see the finish and rushed down to get to the front of the balcony, and I first noticed it on the last lap, as the men were coming around the last turn, when I saw the people in the front row of the balcony beginning to lean over the railing and a great many of them with their hats in their hands I mean particularly, leaning over there and shouting to the runners, waving their hats and yelling, so that many of them were bent very far over the balcony with the railing about across the middle of their bodies and most of their weight on the outside, and people behind them were rushing down, jumping over the seats and everything else to get a view of these runners who were right down below them, and the next thing I saw was the—mentioned to several people that the crowd was the wildest I had even seen in an event of that kind—and the next thing I noticed was this wave of people just falling over the edge of the balcony.”

There was some testimony tending to show that the railing would not resist very much of a strain; but the jury had this question before them, and evidently concluded that the strain was very great and unprecedented, and that the contractors were not responsible for this extraordinary strain. The answer of the jury to the special interrogatory was to the effect that, at the time of the occurrence of the accident in question, the railing around the balcony constituted a nuisance. It is the contention of the appellants that this is not a finding that the railing around the balcony was a nuisance at the time the building was completed and turned over to the state. But we think this would be too narrow a construction to place upon this finding, as there is nothing in the testimony to show that the railing was in any different condition at the time of the accident than it was at the time it was completed. In fact, it appears pretty conclusively from the testimony that it was in the same condition.

So that it becomes necessary to determine whether the instruction given by the court, to the effect that if the jury

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found that the railing was a nuisance the defendants would be responsible, was erroneous. We think, under the great weight of authority, that it was. The word "nuisance" is so comprehensive that it has been applied to almost all wrongs which have interfered with the rights of the citizen, either in person, property, the enjoyment of his property, or his comfort, and is defined as, "anything that worketh hurt, inconvenience, or damage." *Veasie v. Dwinel*, 50 Me. 479, citing 3 Black. Com. 116. It is also defined as, "anything that unlawfully worketh hurt, inconvenience or damage." *People v. Metropolitan Tel. & Tel. Co.*, 11 Abbott's New Cases, 304. Russell, in his treatise on Crimes, said: "'Nuisance' signifieth anything that worketh inconvenience." "Whatever unlawfully annoys or does damage to another is a nuisance." *United States v. Douglas-Willan Sartoris Co.*, 3 Wyo. 287, 22 Pac. 92. "A 'nuisance', as ordinarily understood, is that which is offensive and annoys and disturbs." *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711. "A 'nuisance' is that which disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable." *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317. "The term 'nuisance', derived from the French word 'nuire' to do hurt or annoy, is applied in the English law indiscriminately to infringements upon the enjoyment of proprietary and personal rights." Addison on Torts, 155. There are very many other definitions of the word or term 'nuisance' which, in effect, spread it over almost every injury that is done by one person to another; but we have cited enough to show the general idea of the term nuisance.

Now, it is earnestly contended by the respondent that the general rule is that all parties to a nuisance, he who creates it and he who maintains it, are responsible for its effect without limitation of condition or of time; and this is undoubtedly true as to a certain class of nuisances—what are termed nuisances *per se*. But in order to intelligently consider these

general announcements in regard to the responsibility of parties to a nuisance, whether of owners or builders or lessors or lessees or contractors, the term and the responsibility must be classified, or an investigation, however extensive it may be, results only in confusion. This classification is intelligently set forth in *McCaffrey v. Mossberg & G. Mfg. Co.*, 23 R. I. 381, 50 Atl. 651, 91 Am. St. 637, 55 L. R. A. 822, where it was held that the manufacturer of a drop press was not liable to a purchaser's employee for injuries caused by the breaking of a defective hook holding a heavy weight, the cause of the injury not being in its nature imminently dangerous, and there being no fraud or concealment or implied invitation to the employee to use the machine. The court in that case said:

"Cases which involve the liability of a defendant to those with whom he does not stand in privity of contract may be grouped into three classes: (1) Where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the thing; (3) where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous. The principle that governs the first class of cases is that one who deals with an imminently dangerous article owes a public duty to all to whom it may come, and whose lives may be endangered thereby, to exercise caution adequate to the peril involved."

This principle has been applied in many cases to the sale of poisonous drugs under a false label, where dangerous naphtha was sold, where laudanum was sold for rhubarb, and in general where the action was in relation to the things that were inherently dangerous, as where the air which people breathe is poisoned or polluted with noxious vapors, where vicious animals are allowed to run at large, and where deadly missiles are thrown into a gathering or crowd of people. Said the court in that case:

"A similar principle governs the second class of cases, in which the degree of danger in the thing itself may be less, but

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where the seller actually knows of the danger in the article and puts it forth by some fraud or deceit. In such cases the breach of duty grows out of the fraud or deceit in the sale, and it extends to persons injured thereby, who may reasonably be deemed to be within the contemplation of the parties to the transaction."

And instances are given by the court of this character of nuisances. It will be seen that this case does not fall within either of these classes. The thing built or constructed here—the armory—of course, was not of a noxious or dangerous kind, and nothing noxious emanated from it; and within itself it could not be said to be dangerous. The danger would depend entirely upon the use to which it was put. The third class of cases, said the court in the case we have just been reviewing, relating to the sale of a thing not in its nature dangerous, rest upon the principle that in such thing there is no general or public duty, but only a duty which arises from contract out of which no duty arises to strangers to the contract. It will be seen in this case that there was a contractual relation between the builders—the owners of the armory and the contractors, which ended with those two parties. The principle governing this sort of a transaction is treated of by Cooley on Torts (2d ed.), 672, where the author appropriately remarks:

"An attempt to classify nuisances is, therefore, almost equivalent to an attempt to classify the infinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights. It is very seldom, indeed, that a definition of a nuisance has been attempted, for the reason that, to make it sufficiently comprehensive, it is necessary to make it so general that it is likely to define nothing."

It is also treated of by Wharton in his Law of Negligence (2d ed.), § 438, *et seq.*, and he bases the liability on the law of contract and of what he terms "causal connection," as will be seen from the following excerpt:

"Thus a contractor is employed by a city to build a bridge in a workmanlike manner; and after he has finished his work,

and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is, that otherwise there would be no end to suits. But a better ground is that there is no causal connection, as we have seen, between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent responsible agent, breaking the causal connection."

Many cases are cited which seem to be squarely in point sustaining the text. It will be seen, however, that this is a stronger case against the respondent's contention than the case at bar; because, in the instance given by the learned author, the accident was caused by the contractor's negligence; while in the case at bar, if the contractors are to be held liable under the testimony, they are liable because they carried into effect the plans and specifications which were furnished them by the owner.

There is an attempt by the respondent to establish the fact that there was no specification as to the manner in which the railing should be attached; and that, inasmuch as there was a provision in the contract for an application to the architect to furnish specifications when any were omitted, and as no written application had been applied for, the contractors themselves became responsible for the manner in which the railing was fastened to the building. But the overwhelming and undisputed testimony is that, while no written application was made to the architect, he was there, looking over the work and seeing how the work in every particular was done; and it must be reasonably concluded that this part of the work, as well as all the rest, was done by consultation with, or by at least the consent and direction of, the architect. The

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testimony of the architect, as to the building being completed in every respect according to the specifications, is so direct and positive that there can be no question raised about it. It would be a hard and impracticable rule to announce that a man who had performed his duty under the contract should be held responsible for the sufficiency and correctness not of the work which he performed, but of the plans which are furnished him to be carried into execution. It may readily be conceived that a carpenter or builder may have the mechanical knowledge and skill to erect a building or structure of any kind, when he would in no way be competent to determine its safety or whether it would meet the requirements of its construction. Frequently such questions would have to be determined by skillful and learned engineers. In the case of building bridges, the resisting or sustaining power of material would have to be scientifically determined; and it would be a strange law indeed that, under such circumstances, the mechanic would be held responsible for a mistake in a calculation of this kind. The result would be, either that contractors would refuse to erect structures, or that, in order to make themselves safe, they would charge such prices as would be prohibitive.

In reviewing the many cases that have been cited to us, and which we have been able to find through our own research, there has entered into nearly all of them, where the contractor has been held liable, the element of negligence or of violation of contract. The respondent cites the following from Wood on Nuisances, vol. 2 (3d ed), § 703, under the heading, "Personal injury always actionable when person injured is free from fault."

"It should perhaps be stated that for personal injuries sustained by a person by reason of any nuisance in a highway, of injuries thereby inflicted upon his team or property, the person creating the nuisance, as well as the person maintaining it, is always liable in a civil action, if the person injured was in the exercise of ordinary care when the injury was inflicted, and no degree of care on the part of the person erect-

ing or maintaining the nuisance will exempt him from liability. The act is a wrongful one, and he is answerable for all the consequences that flow therefrom, to a person who is not chargeable with negligence by reason of which the injury is inflicted;”

citing to sustain the text, *Jones v. Chantry*, 4 T. & C. (N. Y.) 63, and *Chicago v. Robbins*, 2 Black (U. S.) 418. In *Jones v. Chantry*, the defendant placed wagons in a highway, and the plaintiff, in turning to avoid collision with the wagons, ran upon a heap of sand which had been hauled there by the defendant, and was thrown out of his wagon and injured. It was held that the defendant, having directed where the sand should be deposited, was not exempted from liability for the injury caused by it because the person who placed it there was a contractor for the erection of the building in which it was to be used. It will be seen that this was the ordinary case of damages for obstruction in the street, which was directed to be placed there by the defendant in the case, and in no way bears upon the text announced by the author above quoted. In *Chicago v. Robbins*, so far as the question under discussion by the learned author was concerned, it was simply held that, if a nuisance necessarily occurs in the ordinary mode of doing work, the occupant or owner is liable; but if it happens by the negligence of the contractor or his servants, the contractor alone is liable. That, too, is the universal doctrine in relation to the liability of independent contractors, and in no way bears upon the subject under discussion, where, as we have seen, this case must be dealt with on the theory that there was no independent negligence on the part of the contractors.

In *Galbraith v. Illinois Steel Co.*, 133 Fed. 485, 2 L. R. A. (N. S.) 799, it was held, where the owner of a building contracted with the company to install a sprinkler system according to plans and specifications, and the company contracted with the defendant for the construction of the support, but in the actual construction a tie member specified in the plans was omitted by the defendant, and by reason of such

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omission the support afterwards collapsed and damaged the plaintiff, the plaintiff could not maintain an action in tort to recover such loss from defendant, whose duty was measured by the requirements of the contract and was enforceable only by the other party to the contract; the court basing its opinion on the doctrine, announced above by Wharton, that there was no contractual connection between the defendant and the plaintiff. Judge Grosscup dissented in that case—not upon the theory contended for by the appellants in this case, but upon the theory of contractual responsibility.

“The modern structure,” said the judge, “is the work of many trades. To safely erect such structure, plans and specifications covering the whole, by competent architects, are not simply a convenience—they are a necessity. Through such plans and specifications alone, can the work of the many trades be co-ordinated. Through them alone, in the midst of diversity can the owner build to a given end. Plans and specifications, therefore, are essentially the Law of the Building. They are in practical effect, the owner’s direction to the contractors—not simply to the immediate contractor, but to all who take contracts subservient thereto, a direction that each contractor by taking his contract in reality accepts; and safety and good faith demand not simply that contractors should perform their contracts with each other, but that each contractor, by living up to the Law of the Building, should obey the direction thus given and accepted, and thus perform his duty to the owner—indeed, to all who may, in person or property, be directly affected by the buildings being erected in accordance with the plans and specifications.”

The term “law of the building,” is a happy and forceful expression, and is particularly pertinent to the facts of this case. No higher duty, it seems to us, can be demanded of the ordinary contractor in building structures of this kind, than to live up to the law of the contract or the law of the building. In *First Presbyterian Congregation v. Smith*, 163 Pa. 561, 30 Atl. 279, 43 Am. St. 808, 26 L. R. A. 504, it was held, not only that a contractor was not liable, but that the negligence of a contractor in building a sewer for a city would not

render him liable to the owner of private property which was injured by the breaking of the sewer, after the completion of the work and its acceptance and use by the city. This case goes beyond the defense in relation to following the specifications, but also reaches the other defense that the property had been turned over to the owner and that the contractor was no longer responsible for it. In this case the class of cases which may be termed nuisances *per se* were noticed and distinguished from the case under consideration. It announces its allegiance to the rule of causal connection put forth by Mr. Wharton as above cited, and reaffirmed the doctrine of *Curtin v. Somerset*, 140 Pa. St. 70, 21 Atl. 244, 23 Am. St. 220, 12 L. R. A. 322, which is severely criticized by learned counsel in this case.

In *Curtin v. Somerset*, it was held that, in order that a person who had been injured by an accident may hold another liable therefor upon the ground of negligence, there must be a causal connection between the negligence and the hurt; and that such casual connection must be uninterrupted by interposition between the negligence and the hurt of any independent human agency. It was there held that a contractor for the erection of a hotel building, who used improper material in its construction and in other respects departed from the specifications embodied in his contract, so that the building when completed was structurally weak and unsafe, would not be liable to a guest of the hotel for an injury caused to him by such defective construction occurring after the owner had taken possession. That case was distinguished from *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, where the court held a dealer in drugs and medicines, who carelessly labeled a deadly poison as a harmless medicine and sent it so labeled into market, was liable to any one who was injured without any fault on his part; holding that there was no analogy between that class of cases and the one under consideration. It is intimated by learned counsel for respondent that this case stands alone and ought to receive the condemnation of

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other courts, but from our investigation it seems to us that it is well sustained by authority, and omitting that portion of the case which bears upon the liability of a negligent contractor, meets with our endorsement.

In *Lancaster v. Connecticut Mut. Life Ins. Co.*, 92 Mo. 460, 5 S. W. 28, 1 Am. St. 739, the distinction was made between a case where the negligence which produced the injury was in the workmanship or materials to be furnished by the contracts, and one where the negligence was in the plans and specifications; and held that in the latter case the defendant would be relieved from liability. This case, we think, is in harmony with the great weight of authority and with right reasoning.

In *Mayor etc. of Albany v. Cunliff*, 2 Coms. (N. Y.) 165, it was held that the mere architect or builder of a public work was answerable only to his employers for any want of care and skill in the execution thereof, and that he was not liable to third persons for accidents or injuries which might occur after the completion of such work; a much stronger case than the one under consideration. The court, in the course of its remarks in that case, at page 174, said:

"But the bridge was completed, and had been in the charge of pier owners, more than three years before it fell and injured the plaintiff. In such a case, there is neither precedent nor principle for allowing a third person to turn from those who are bound to maintain the bridge, and bring an action against the architect or builder. He is only answerable to those for whom he builds."

The court added:

"He is not answerable to them, if he builds according to his contract or duty, however frail the structure may be. But the owner, on whom the duty of maintaining rests, is answerable to third persons for the sufficiency of the work, whether he has been injured by the builder or not."

The court then proceeds to the statement that a party who has erected a nuisance will sometimes be answerable for its

continuance after he has parted with the possession of the land, but that it is only where he continued to derive a benefit from the nuisance; citing different cases to that effect. But even in those cases it was an erection of a nuisance by the owner or director that was spoken of.

In *Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457, 57 Am. St. 204, 32 L. R. A. 837, it was held that the negligence of a contractor in reconstructing a building would not render him liable to a third person who was injured in consequence thereof, after the work had been completed and accepted by the owner of the building; endorsing the rule of causal connection before referred to, and citing many cases to sustain the doctrine. Without further discussion, the same doctrine is announced in *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Paterson Extension R. Co. v. Rector etc.* (N. J.), 53 Atl. 449; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19, and a wilderness of other cases bearing directly or indirectly upon this proposition.

The respondent attempts to show that many of the cases which we have reviewed did not sustain the doctrine of non-liability on the part of the contractor, but we think that they unquestionably do, and that the attempt has not been successful. Few of the cases relied upon by the respondent really sustain his view. From a thorough investigation of this question—for it has been an interesting one and the court is indebted to counsel on both sides for great research and industry in presenting it in a masterly way—we are compelled to hold that, especially in the absence of negligence on the part of an independent contractor—a question which under the testimony in this case we think is not pertinent—and especially where the structure has been taken over by the owner and accepted as completed under the plans and specifications, such contractor is not responsible to third parties for injuries sustained by any defects in such structure.

There was some question raised by the respondent in relation to the illegality of the manner of acceptance, but the

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whole testimony is conclusive that, while there might have been some technical omissions, as a matter of fact the state did have control of the armory; that the officer appointed by the state to receive it had passed upon and received it; that it was in the possession of the state at the time of the accident; and that the parties who were injured were there by invitation of the state alone.

Under such circumstances the judgment of the court will be reversed. While the court undoubtedly, and so candidly stated, granted the motion for a rehearing alone on the alleged misconduct of the jury, there were some other questions raised on the motion, and the court, in response to the request of counsel for the respondent, made the order general; so that the cause will be remanded with instructions to pass upon questions raised upon the motion for a new trial other than the ones discussed in this opinion; and if not sustained upon such other grounds, the court will enter judgment upon the verdict of the jury.

RUDKIN, C. J., MORRIS, CROW, and CHADWICK, JJ., concur.

[No. 9193. Department One. November 28, 1910.]

WENATCHEE ORCHARD & IRRIGATION COMPANY *et al.*,

Appellants, v. WILL H. THOMPSON *et al.*,

Respondents.¹

APPEAL—BOND—SUFFICIENCY—DISMISSAL. An appeal will be dismissed where no name appears as a surety on the face of the appeal bond nor among the signatures and the justification affidavit on the back does not purport to be made by a surety.

SAME—OBJECTIONS TO BOND—WAIVER. Where the bond on appeal is not executed by any surety, failure to except to the same below does not preclude the respondent from moving to dismiss the appeal for want of any bond on appeal.

¹Reported in 111 Pac. 874.

BONDS—SUFFICIENCY—STATUTES—WANT OF SURETY. Rem. & Bal. Code, § 777, providing that no bond shall be void for want of form or substance, etc., has no application where the bond has no surety upon it at all.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered June 6, 1910, in favor of the defendants. Dismissed.

M. V. Boddy, for appellants.

Will H. Thompson, Charles A. Murray, and H. H. Benton, for respondents.

PARKER, J.—A judgment was rendered in this cause by the superior court for Chelan county on June 6, 1910, in favor of the defendants. On August 30, 1910, the plaintiffs attempted to appeal therefrom to this court by giving and filing a notice of appeal, and by filing an appeal bond. In so far as we are required to notice the bond, it is as follows:

“Know all men by these presents: That we Wenatchee Orchard & Irrigation Co. as principal, and as sureties, are held and firmly bound unto . . . the debts. . . .

“Wenatchee, Orchard & Irrigation Co.

“By M. V. Boddy, Pres.

“Jean Boddy, Sec’y.”

On the back of this bond is indorsed an affidavit as follows:

“State of Washington, County of Chelan. ss.

“Howard Honner and being first duly sworn, each for himself, on oath says that he is not an attorney or counsellor at law, sheriff, clerk or other officer of the Superior Court; that he is a resident of the County of Chelan, State of Washington, that he is worth the sum of \$200.00 Dollars in separate property, over and above all his just debts and liabilities and property exempt from execution.

“Howard Honner.

“Subscribed and sworn to before me this 30th day of Aug. A. D. 1910.

“(Seal) J. L. Campbell, Clerk of the Court.”

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There is nothing else in the body of the bond, the signatures thereto, or the indorsements thereon indicating its execution by any surety.

The respondents now move to dismiss the appeal and for affirmance of the judgment, upon the ground, among others, that "the appeal bond is fatally defective in not complying with the statute in that it is signed by no surety." Rem. & Bal. Code, provides:

"Sec. 1721. An appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party conditioned for the payment of costs and damages as prescribed in section 1722, be filed with the clerk of the superior court, or money in the sum of two hundred dollars be deposited with the clerk in lieu thereof. . . ."

"Sec. 1722. The appeal bond must be executed in behalf of the appellant by one or more sufficient sureties. . . ."

One of the grounds of dismissal of an appeal, enumerated in Rem. & Bal. Code, § 1733, is "that the appeal bond . . . is not in form or substance such as to render the appeal effectual." This provision was given full force in the case of *Erickson v. Erickson*, 11 Wash. 76, 39 Pac. 241. It seems to us that this bond is not only defective, but that it is no bond at all, so far as sureties are concerned. No name appears as surety anywhere upon the face of the bond or among the signatures thereto, and the affidavit upon the back does not purport to be made by a surety. By no possible construction could it be held that this bond binds any one as surety; and it is therefore not such a bond as is required by the provisions of law above quoted as renders the appeal effectual.

Learned counsel for appellants contend that since respondents took no exceptions to the bond in the superior court, it is too late to object to it in this court. It may be conceded that there may be defects in an appeal bond which can be waived by a failure to object to the bond in the superior court,

but the want of a surety upon a bond is as far from satisfying the law as it would be to file a mere form of a bond with no one executing it. The binding of a surety is the real purpose of requiring a bond. The appellant is already bound by virtue of being a party to the action. None of the decisions of this court cited by counsel for appellants go so far as to render a paper which is not a bond binding sureties, an effectual bond to perfect an appeal, by a failure to object thereto in the superior court. We will notice these decisions in order. *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690, 40 Am. St. 922, was a case where the defect was the failure of the surety to include in his affidavit the statement that his property was in this state. The court simply held that this went to the sufficiency of the surety, and should have been presented to the superior court upon exceptions to the sufficiency of the surety, under Rem. & Bal. Code, § 1726. There was no question as to there being a surety bound by the bond. The question was only as to his property qualifications.

In *Cook v. Tibbals*, 12 Wash. 207, 40 Pac. 935, the alleged defect consisted of the signing of the bond by the appellant by his attorney in the case. The court held that was a sufficient execution of the bond. There was no question of there being sureties upon the bond, bound thereby.

In *Yakima Water, Light & Power Co. v. Hathaway*, 18 Wash. 377, 51 Pac. 471, the defect consisted of a failure of the sureties to sign the bond, but their names appeared in the body of the bond as sureties and they signed the affidavit attached to the bond, referring to themselves as, "the sureties named in the foregoing bond," as shown by the record in that case. It was held that this was an execution of the bond by them. *Tumwater v. Hardt*, 28 Wash. 684, 69 Pac. 378, 92 Am. St. 901, involved substantially the same question, though that was an official bond of a town treasurer.

The case before us differs from all these in not having the name of any surety in the body of the bond, no signature of any surety to the bond, and no reference to any person as

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surety in the affidavit on the back. Some reliance is placed by counsel for appellant upon Rem. & Bal. Code, § 777, providing:

“No bond required by law, and intended as such bond, shall be void for want of form or substance, recital, or condition; nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond.”

This provision has no application here, for the reason that this bond has no surety upon it at all. So there is no surety to be bound.

We are of the opinion that this appeal is ineffectual because there is no bond accompanying it, executed by any surety. This renders it unnecessary to discuss other questions presented by respondents' motion. The appeal is dismissed.

RUDKIN, C. J., MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9014. Department Two. November 29, 1910.]

ED. EASTERLY, *Respondent*, v. EATONVILLE LUMBER
COMPANY, *Appellant*.¹

MASTER AND SERVANT—PROMISE TO REPAIR—PLEADING. The objection cannot be raised that a promise to repair was not made by defendant's vice principal, where the answer fails to deny allegations of the complaint that the employees making the promise were defendant's foreman and head millwright; and the evidence showed that they did make the promises.

SAME—PROMISE—CONTEMPLATION OF CONTINUANCE. A promise to remedy an improper construction of a sawdust chute in a shingle mill which required increased subjection to danger in releasing the sawdust, must have been made in contemplation of the operator's continuance at work, where there was nothing said about abandoning the machine or permitting it to remain idle.

¹Reported in 111 Pac. 876.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of a shingle weaver in releasing sawdust in a chute near the saw with a short stick, after a promise by the master to repair the place, is for the jury, where that was the usual method.

APPEAL—REVIEW—WAIVER OF OBJECTION. The finding of a jury upon an issue, under proper instructions framed by the appellant, is conclusive and precludes objection that the issue should have been determined by the court.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. A shingle weaver is not guilty of contributory negligence, as a matter of law, in releasing sawdust in a chute without stopping the saw, where it was not usual to do so, and would have consumed much time, and it appears that he used a short stick for the purpose according to the usual method, and only did so for a reasonable time after objection and promise to repair.

APPEAL—REVIEW—VERDICT. The verdict of a jury upon conflicting evidence is conclusive on appeal.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$2,750 is not excessive, where a shingle weaver, 24 years of age, lost two fingers and sustained an injury to his thumb, impairing his earning capacity to the extent of at least fifty cents a day, and suffered much pain and inconvenience.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 18, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a shingle weaver in a shingle mill. Affirmed.

Hudson & Holt (Chas. Bedford, of counsel), for appellant.

Govnor Teats, Hugo Metzler, and Leo Teats, for respondent.

Crow, J.—Action by Ed. Easterly against Eatonville Lumber Company, a corporation, to recover damages for personal injuries. From a judgment in his favor the defendant has appealed.

Appellant's controlling assignment is that the trial court erred in denying its motion for a nonsuit, and its motion for a directed verdict.

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The appellant owned and operated a shingle mill in Pierce county, in which it installed four upright shingle machines, only three of which had been used prior to respondent's employment. The respondent, an experienced shingle weaver, was employed by appellant to work upon the fourth machine. Below and near the saw a chute was installed to carry dust to a conveyor below. Respondent introduced evidence to show, that this chute inclined in the wrong direction; that, by reason of its improper construction, dust frequently accumulated and clogged it below and near the saw; that it then became necessary for respondent to push the accumulated dust into the chute, so that it could pass to the conveyor; that he did this with a short stick or piece of shingle, while the saw was in motion, a method usually employed in the mill; that he complained to appellant's foreman and head millwright of the improper construction of the chute, telling them it caused sawdust to accumulate, requiring its frequent removal, and suggesting a method by which it could be changed so as to avoid further trouble; that they promised to make the change; that relying upon such promise, he continued work under the existing conditions; that shortly thereafter, while he was attempting to release accumulated dust, the saw struck the piece of shingle he was using, causing his hand to be suddenly drawn against the saw and injured, and that appellant was negligent in failing to furnish him reasonably safe machinery with which to work.

In support of its assignments of error, the appellant first contends that the alleged promise to repair was not made by any vice principal or other person having authority. Under our construction of the pleadings, it is in effect conceded that Al Cook and Harry Morgan, to whom respondent complained, were appellant's foreman and head millwright. The complaint alleges that respondent "thereupon complained to the foreman, Al Cook, who thereupon promised him that he would arrange and adjust the same [the chute] so that it would not pack sawdust, and that plaintiff would not be required to re-

move the sawdust." Similar allegations were made as to "the head millwright Harry Morgan." The answer contained no denial that Al Cook was appellant's foreman or that Harry Morgan was its head millwright. As to Cook, it says: "Defendant denies that the plaintiff complained to the foreman Al Cook and denies that the said foreman Al Cook promised the plaintiff that he would arrange and adjust the conveyor." While this language amounts to a denial of any complaint by respondent, or any promise by Cook, it does not deny that Cook was foreman. It rather infers that he was the foreman by describing and alluding to him as such. We think it apparent that Cook was appellant's foreman, that Morgan was its head millwright, and that respondent's evidence, which on the motion for a directed verdict must be accepted as true, was sufficient to sustain a finding that he did complain to them, that they did promise to make the repairs, and that he continued work, relying on such promise.

Appellant further contends it does not appear from the evidence that the foreman or millwright requested respondent to continue work, or that they knew he was using the dangerous method of releasing the dust by using a short stick or piece of shingle, near the moving saw; that nothing was said between them and respondent relative to the dangers to which he was subjected, but that his complaint had reference only to the alleged improper construction of the chute. This is a technical contention, without substantial merit. There was evidence that all shingle weavers in the mill constantly used the same method for releasing accumulated dust in a chute in front of a saw, and that the respondent, by reason of the improper construction of the chute, was required to remove it much more frequently, subjecting him to greater danger. The foreman, who was constantly about the mill, must have known these facts. He and the millwright knew the respondent continued his work, and must have assumed that he continued it in the usual manner. There is no contention that he was ordered or expected to abandon the machine or permit it to

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remain idle. Respondent's evidence was that he continued work relying solely upon the promise made, and that within a brief period thereafter, while so working, he was injured. Under such circumstances, the promise must have been made in contemplation of continued work by respondent for a reasonable time and under existing conditions, until the change could be made.

Appellant further contends that the method of releasing the sawdust with a piece of shingle near the moving saw was very dangerous, a fact known to respondent, and that it was the duty of the court to adjudge him guilty of contributory negligence as a matter of law, in continuing work, knowing of such imminent danger. Whether the method was so imminently and certainly dangerous as not to be adopted by an employee, acting with ordinary prudence and caution, was in the light of the evidence as to the usual method of work, the promise to repair, and respondent's reliance thereon, a question for the determination of the jury under proper instructions from the court. The trial judge, at appellant's request, did instruct as follows:

"You are instructed, gentlemen of the jury, that the plaintiff cannot recover in this action without showing that the defendant, through one of its authorized agents, promised the plaintiff to repair the chute or conveyor in such a manner that the sawdust would not accumulate so as to render its removal necessary, and that the complaint was made by plaintiff for the purpose of providing for his safety while using this saw, and that the promise was made with a view to his safety, and that the said plaintiff continued to work at the saw relying upon the fulfillment of the said promise, and that but for the said promise he would not have continued to do so; and even if you find these facts to be true, if you also believe from a fair preponderance of the evidence that the danger of removing the sawdust in the manner in which the plaintiff undertook to do so was so imminent and threatening that a reasonably prudent man would not have undertaken to do it, and that the manner in which it was done amounted to recklessness, you will find for the defendant."

Under this instruction, framed by appellant's attorneys, the jury found for the respondent, and their verdict is conclusive on the issue involved.

Appellant further contends that the respondent was guilty of contributory negligence in attempting to remove the dust while the saw was in motion; that he was provided with proper appliances to stop the saw without disturbing any other moving machine or other portion of the mill; that a safe way was thus provided for him to remove the dust; that instead of adopting the same, he voluntarily elected the dangerous and unsafe plan of using a piece of shingle near the moving saw, and that in so doing he was, as a matter of law, guilty of such contributory negligence as to preclude any recovery. There was evidence that the sawdust clogged the chute frequently and repeatedly, especially at this particular machine; that to stop the saw in each instance would consume much time; that appellant's employees were working by the piece; that the method adopted by respondent was the usual one adopted by all the employees in the mill, and that ordinarily the machine was stopped only when it became necessary to change a dull saw for a sharp one.

No two actions are identical. Each must be considered in the light of its own facts and environment, and be determined on correct legal principles. Relative to the effect of the promise made by appellant's foreman and head millwright, respondent cites the case of *Shea v. Seattle Lum. Co.*, 47 Wash. 70, 91 Pac. 623, but appellant, attempting to distinguish its facts, insists that it is not pertinent. The reason appellant's foreman and head millwright promised to change the chute was that improper construction had caused it to become clogged more frequently than if properly constructed, thereby subjecting respondent to a greater degree of danger. Manifestly their promise contemplated relief from this condition. They must have realized that was what respondent desired. No other incentive existed for the complaint and request made by him. They must also have been aware of the

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fact that respondent continued his work in the same manner, unless they failed to observe the customary actions of respondent and other employees, a flagrant neglect of duty not disclosed by the evidence. Their promise, if made at all, was certainly made in contemplation of a continuance of work by respondent for such a reasonable length of time as would be required to change the chute. The substantial effect of respondent's evidence was that, exercising reasonable care, he so continued relying on the promise made. This being true, there is no such material distinction in the facts as to prevent the *Shea* case from being applicable. We there said:

"It is elementary law that it is the duty of a master to provide his servant with reasonably safe machinery, tools, and appliances with which to perform the work required of him, and to also keep the same in reasonably safe condition. Whether the stick used met this requirement was a question of fact to be submitted to the jury. It is contended by the appellant that the respondent had just as much knowledge of the fact that the stick was a dangerous and unsafe appliance as had the master, and that the respondent therefore assumed the risk of all dangers which might result from its use. This would be true had the respondent continued its use without objection or complaint after he actually appreciated the danger, but he only did so for a reasonable time while relying on the promise of the master. After appellant's foreman had made this promise, it assumed all risk of danger arising from respondent's careful use of the unsafe appliance during such reasonable time as might thereafter be necessary to provide the iron rod."

The fact that the edger and saw were not in the control of Shea was mentioned by this court, but calling attention to other material facts, we further said:

"The evidence further indicates that the custom in appellant's mill was to clean the chute while the edger was running. It is not shown that the machinery was ever stopped, or that the saws were moved by respondent or any other employee, at any time in the history of the mill for the purpose of cleaning the chute. The fact that a long stick was provided in-

dicates that it was to be used while the machinery was in motion. The foreman saw and permitted respondent to use the stick without stopping the edger or changing the saws, and even after the accident an iron bar was provided, showing that the appellant still intended to permit the cleaning of the chute without stopping the edger or moving the saws. The evidence discloses no rule of the mill for doing the work in any other manner. These facts clearly distinguish this case from those cited by the appellant. Courts do not hold plaintiffs guilty of contributory negligence, as a matter of law, unless the circumstances are such that reasonable men may not differ as to the existence of such contributory negligence. The question of the existence or nonexistence of contributory negligence upon the part of the respondent was, under the evidence before us, an issue of fact to be submitted to the jury."

Under the facts and circumstances disclosed by the evidence now before us, the question of respondent's alleged contributory negligence was for the jury. The trial judge instructed as follows:

"You are instructed, gentlemen of the jury, that if you believe from a fair preponderance of the evidence in this case that a reasonably prudent man would not have undertaken to punch out the sawdust in the manner plaintiff was doing at the time of his accident, but that such a man would have used the lever and thrown off the tightener, and stopped the saw before doing it, you will find for the defendant."

Under this instruction and the evidence, the jury found for the respondent. The question involved was for their exclusive determination, and their verdict cannot be disturbed.

It is contended that the jury awarded excessive damages. The respondent, an experienced shingle weaver, twenty-four years of age, sustained an injury to his thumb and lost portions of two fingers, which impaired his earning capacity to the extent of at least fifty cents per day. His life expectancy was about thirty-eight years. He has suffered much pain and inconvenience. The jury awarded \$2,750, which we regard as abundant compensation. We do not, however, con-

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clude that it is so flagrantly excessive as to justify any interference by this court.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, CHADWICK, and MORRIS, JJ., concur.

[No. 9114. Department One. November 29, 1910.]

In re Guardianship of MURRAY MACKALL.

W. E. LOWRIE, *Respondent*, v. AMERICAN BONDING AND TRUST COMPANY, *Appellant*.¹

GUARDIAN AND WARD—ACTION ON BOND—OFFSET—SUPPORT OF WARD—WAIVER. Where a mother, having no estate of her own, acted as guardian for her minor son, and filed a report making no charge for support up to that time, but afterwards converted the estate, the report shows that she did not intend to charge for support previous to the report, and in the absence of other evidence overcomes the presumption to the contrary; and the surety on her bond cannot offset against its liability a charge in favor of the guardian for support prior to the filing of the report.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 2, 1910, upon stipulated facts, disallowing, in part, an offset in favor of a guardian for support of a ward. Affirmed.

F. S. Blattner and U. E. Harmon, for appellant.

W. R. Flaskett and J. H. McMenamin, for respondent.

MOUNT, J.—The question in this case is whether the surety on the guardian's bond may offset the keep of the ward by the guardian against the liability upon the bond, where there is no evidence that the guardian intended to charge such keep against the estate of the ward. The question arises upon the following facts, which are stipulated in the case: That A. R. Mackall, father of Murray Mackall, died in July, 1898, and

¹Reported in 111 Pac. 884.

G. Y. Travis was appointed guardian of Murray Mackall and his sister Roberta Mackall, in the state of Ohio; that on the 20th day of May, 1902, Rosa K. Mackall was appointed guardian of Roberta Mackall and Murray Mackall, the minor children, the estate consisting of \$3,800 in cash, in the hands of the guardian in the state of Washington; that upon her appointment, a surety bond in the sum of \$7,600 was given by her, upon which bond the American Bonding and Trust Company became surety, and upon the 29th day of August, 1904, said guardian filed in said court a report in which she showed that Roberta Mackall had arrived at the age of eighteen years, and had been settled with in full by her said guardian. Said report further states, in paragraph 4 thereof, as follows:

"Your petitioner further reports that the money belonging to Murray Mackall amounting to \$1,850 is fully and securely invested by your petitioner as guardian in first-class improved property in the city of East St. Louis, state of Illinois, a security with a present market value of \$3,400, from which investment your petitioner is receiving a net annual profit of ten per cent per annum upon the amount so invested;"

that on the 6th day of September, 1904, W. O. Chapman, one of the judges of the superior court of the state of Washington in and for the county of Pierce, entered an order approving said report, which among other things provides as follows:

"And it further appearing to the court that all of the acts of said guardian in the management of her trust herein have been regular and in accordance with law, and the court being fully satisfied in the premises: Therefore it is by the court ordered, that all of the acts and transactions of the guardian herein be, and the same are hereby, approved and ratified;"

that no further report has been filed in this cause by said guardian Rosa K. Mackall, and during the month of September, 1906, said Rosa K. Mackall left the state of Washington, and departed for parts unknown; that the real property in East St. Louis referred to in the last report of said guardian was described as follows, which said property was purchased

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by Rosa K. Mackall on the 8th day of July, 1904: "The southeast 30 feet of lot numbered 3, and the northwest 30 feet of lot numbered 3, of Lincoln Place Annex;" that the purchase price of said property was \$3,400, part of which was paid in cash and security given for the balance, and that the deed for said property was taken in the name of Rosa K. Mackall, trustee; that on August 3, 1907, without an order of court, said guardian Rosa K. Mackall sold said real property at a loss of \$500, the net price realized being \$2,900; that the proceeds of said sale of said real property were never paid to said minor Murray Mackall or to his present guardian, except the sum of \$314, which was sent to the clerk of this court by the agents of the said Rosa K. Mackall, and which said sum was receipted for by the present guardian on the — day of February, 1908, and no other funds or assets have been turned over to the present guardian by the said Rosa K. Mackall, the former guardian; that on the 23d day of November, 1908, the said Rosa K. Mackall, after notice given in the manner provided by law, and for proper cause, was removed as guardian of Murray Mackall, and thereupon the present guardian W. E. Lowrie, petitioner herein, was duly appointed guardian as aforesaid, and is now the duly qualified and acting guardian of the person and estate of Murray Mackall; that on the 26th day of January, 1910, the present guardian petitioned the court for a settlement by the court of the account of Rosa K. Mackall, former guardian, and for a decree settling said trust, and that a citation was issued, and due and legal service thereof was made in the manner provided by law, and the said Rosa K. Mackall was directed to appear and show cause, if any she had, upon the 14th day of April, 1910, why said account should not be settled by the court at said time; that notice of the time and place of hearing was also served upon the American Bonding and Trust Company, as bondsman for the said Rosa K. Mackall, and that the said bonding company as surety appeared and filed its answer;

that on the day fixed for the appearance of the said Rosa K. Mackall, as aforesaid, she failed to appear, and her default was entered by the court, and the court thereupon proceeded to the hearing of evidence in the settlement of the account, which hearing has been continued from time to time until the 23d day of May, 1910; that the former guardian G. Y. Travis contributed the sum of \$80 and no more to the support of Murray Mackall, and that the said Rosa K. Mackall maintained and supported the said minor from the death of his father, July, 1898, until September, 1906, and the entire expense was borne by her, except the said sum of \$80 paid by the former guardian Travis and the sum of \$280 contributed by the minor himself; that a reasonable amount to be allowed to the said Rosa K. Mackall for such time as the court shall allow her for the expense of maintenance and support is the sum of \$20 per month.

It is claimed by the petitioner that no allowance should be made for maintenance and support of the minor prior to August 29, 1904, while it is claimed by the surety that she should be allowed for the entire period from death of the father up to September, 1906, subject to the credits hereinbefore stated; and it is agreed that this may be considered by the court as evidence offered by the surety and excepted to by the petitioner, and that the decisions of the court may be reviewed on appeal by either party as to the period for which the allowance should be made; that it appears from the evidence that the said Rosa K. Mackall had lost by endorsement for her brother in 1903 the sum she received from her husband's estate, and that it does not appear that she had any other property or estate; that no attorney's fees or fees to the guardian Rosa K. Mackall have been paid.

The court below allowed an offset for the keep of the ward after the date of the report of the guardian at \$20 per month, amounting to the sum of \$500, but refused to allow for such keep prior to the date of the report, for the reason that the report made no claim for such keep, and was therefore con-

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strued as a waiver thereof. We think the lower court was right in this ruling. The just rule seems to be that a mother has the right to support her minor child voluntarily from her personal means, and having done so she cannot be compelled in the interests of creditors to charge the estate of her child with such support which she intended to give gratuitously. Woerner, *American Law*, page 168, § 49; Schouler, *Domestic Relations*, page 349, § 239.

In *Hanford v. Prouty*, 133 Ill. 339, 24 N. E. 565, the court said:

"But it is urged that, as they received from her their maintenance and education during their minority, they should be charged with moneys thus expended in their behalf. . . . but their mother chose, as she had an undoubted right to do, and as perhaps was her legal duty, to maintain them at her own expense, without charging the cost of doing so to their separate estates, and there is no rule which would now permit, and certainly none which would require her, to charge them with such expenditures, in rendering an account of her trusteeship, . . . since it is clearly *proper* for her, if she sees fit to do so, to voluntarily take it upon herself, and having done so, she cannot be compelled, even in the interest of creditors, to charge her children with the expense of that which she has thus elected to do for them gratuitously."

In *Hutson v. Jensen*, 110 Wis. 26, 85 N. W. 689, it was said:

"But it is contended by the appellants that credit should be given for support furnished these minor children by their mother and guardian during the year and a half of her life after her husband's death, . . . The propriety of the allowance to a widowed mother, whether she be or be not guardian, for reasonable expenses incurred by her in the support of her minor children, out of their estate, need not be impugned or questioned. She has the unquestioned right, if she chooses, to support those children voluntarily and out of her own means; and, if she so elects, it lies not in the mouth of any one else to complain."

It is no doubt true, as contended by the appellant, that the surety upon the guardian's bond is entitled to make the

same defense which the principal would be entitled to make, and the presumption would be, in the absence of any evidence upon the question, that the guardian intended to charge for the support of the minor where it appeared that the mother had no estate of her own. But we think the fact that the mother filed a report in August, 1904, and made no charge for such support, is sufficient to overcome the presumption and to show an intention, up to that time at least, to make no such charge. The court allowed \$20 per month after that time.

We are of the opinion that the judgment is right, and it is therefore affirmed.

RUDKIN, C. J., PARKER, GOSE, and FULLERTON, JJ., concur.

[No. 9254. Department One. November 29, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Puget Sound Electric Railway, Plaintiff*, v. JOHN R. MITCHELL, *Judge of the Superior Court for Thurston County, Respondent*.¹

CARRIERS—REGULATIONS—RATES—RAILROAD COMMISSION—REVIEW—APPEAL—SUPERSEDEAS BOND—STATUTES. Rem. & Bal. Code, § 8629, providing for appeals from orders of the superior court reviewing orders of the railroad commission reducing railroad rates, which the superior court in its discretion might "suspend" pending the hearing, and which requires that bonds "shall" be required in addition to the usual appeal bond, is mandatory and contemplates a compensatory bond to supersede the judgment pending the appeal to the supreme court; especially in view of the provision allowing appeal "as in other civil cases," and Rem. & Bal. Code, § 1722, providing for a stay in all cases.

Application for a writ of mandamus filed in the supreme court November 25, 1910, to compel the superior court for Thurston county, Mitchell, J., to fix the amount of a super-

¹Reported in 111 Pac. 873.

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Opinion Per Gose, J.

sedeas bond pending an appeal from an order requiring a reduction of railroad rates. Granted.

B. S. Grosscup and James B. Howe, for relator.

The Attorney General, and W. V. Tanner, Assistant, for respondent.

GOSE, J.—The relator operates an electric railway between Seattle and Tacoma and intermediate points. In November, 1909, W. H. Paulhamus lodged a complaint with the railroad commission, charging that the passenger rates of the Puget Sound Electric Railway, the relator herein, put into effect on the 17th day of October preceding, were unfair, unreasonable, and exorbitant; whereupon a citation was issued and a hearing had, terminating in an order requiring the relator to reduce its passenger rates to conform to a schedule of rates promulgated by the commission, within twenty days after receiving notice of the order. The relator, within the time fixed by law, instituted proceedings in the superior court of Thurston county for a review as to the reasonableness and lawfulness of the order. On November 21, a judgment was entered, affirming the order of the commission. The relator thereupon, in open court, gave notice of appeal to this court, and moved the superior court and the judge thereof, the respondent here, to fix a bond in addition to the appeal bond which would operate as a supersedeas of the judgment pending the appeal. The motion was denied but, at the request of the relator, the operation of the judgment was suspended for ten days, for the purpose of enabling the relator to apply to this court for a writ of mandate. The relator has presented its petition to this court, together with a copy of the order of the railroad commission, and a copy of the record of the superior court showing the matters and things heretofore stated; and prays that a peremptory writ of mandate may issue, commanding the respondent to fix the amount of the stay bond, and to approve the same, upon a timely tender with sufficient surety.

Section 3, page 196, Laws of 1909 (Rem. & Bal. Code, § 8629), provides:

"Any railroad, express, telephone or telegraph company affected by the order of the commission and deeming it to be contrary to law, may institute proceedings in the superior court of the state of Washington, in the county in which the hearing before the commission upon the complaint had been held, and have such order reviewed and its reasonableness and lawfulness inquired into and determined. Pending such review, the court having jurisdiction may in its discretion, *suspend* the order of the commission until the further order of the court pending such litigation, in which event the court may require a bond with good and sufficient security, conditioned that such company petitioning for such review shall answer for all damages caused by the delay in the enforcement of the order of the commission, and all compensation for whatever sums for transportation, transmission or service any person or corporation shall be compelled to pay pending the review proceedings, in excess of the sum such person or corporation would have been compelled to pay if the order of the commission had not been suspended."

In accordance with this provision, on the application of the relator pending the hearing in the superior court, a bond of \$20,000 was filed, and the order of the commission stayed. The same section of the statute, page 199, provides:

"If however, said action in review is instituted within said time the said railroad, express, telephone or telegraph company shall have the right of appeal or to prosecute by other appropriate proceedings, from the judgment of the superior court to the supreme court of the state of Washington, as in other civil cases. In all such proceedings, however, bonds *shall* be required conditioned as hereinbefore provided *in addition* to the usual appeal bond."

We think the language last quoted: "In all such proceedings, however, bonds shall be required conditioned as hereinbefore provided *in addition* to the usual appeal bond," is clearly mandatory. It leaves no discretion with either the court or "a railroad, express, telephone or telegraph company," when an appeal is taken by such company from an

order of the superior court upon a review of a proceeding had before the railroad commission. The legislature doubtless foresaw that such appeals would in practically every case present the question either of the reasonableness of the charge for service or the efficiency of the service, and that the public interest would be best promoted by requiring a stay bond in addition to the ordinary appeal bond. At any rate, it is so provided. The fact that the language of the statute last quoted does not use the word "stay," does not militate against this view. It refers to the language first quoted, for the condition of the bond, where an express provision is made for suspending the order being reviewed upon the filing of a compensatory bond.

It was argued by the attorney general that, the legislature having made the stay pending the proceeding in the superior court a matter of discretion, it would be absurd to presume that it intended to make it mandatory on the final appeal. It has, however, in "all" cases made it mandatory upon public service corporations to file both an appeal and a compensatory bond as a condition precedent to an appeal from the superior court. The compensatory bond would serve no purpose whatever if it did not operate to stay the judgment appealed from.

In *State ex rel. Great Northern R. Co. v. Railroad Commission*, ante p. 218, 110 Pac. 1075, we held that the railroad commission had a right of appeal under the general law, although such right was not expressly given it by the statute under consideration. The conclusion was reached by adopting a liberal construction of the appeal statutes. The liberal rule cannot be given force as to one litigant and denied as to another, without destroying that rule of equality which lies at the foundation of all law. It was apparent to the legislature that the supersedeas bond provided for in the general law was inapplicable to appeals from the orders of the railroad commission, and it therefore provided for a compensatory bond, so that the patrons of a public service cor-

poration would be protected in their rights if the final judgment was in their favor. If the protection is not adequate in all cases, as it is apparent that it may not be, the defect can only be cured by the law-making body. The view we have taken of the statute harmonizes with the general appeal law, Rem. & Bal. Code, § 1722, which provides for a stay bond upon appeal in all cases. If we were in doubt as to the meaning of the language discussed, the provision, giving the public service corporation the right to appeal "as in other civil cases," would require us to reach the same conclusion by extending the provisions of the general law touching supersedeas bonds to appeals of this character.

The peremptory writ will issue as prayed for.

RUDKIN, C. J., FULLERTON, MOUNT, and PARKER, JJ.,
concur.

[No. 8215. *En Banc*. November 29, 1910.]

KALB-GLIBERT LUMBER COMPANY, *Respondent*, v. W. S.
CRAM *et al.*, *Appellants*, H. E. OLSON *et al.*, *Defendants*.¹

ACTIONS—PARTIES—SURETY ON BONDS—JURISDICTION—JUDGMENTS—MARITIME LIENS. No summary judgment can be entered against the sureties on a bond, given to release a vessel, in an action to foreclose a lien thereon, where the sureties do not enter an appearance, although the bond provided that "this bond and the personal liability" of the sureties "shall be and become substituted" for any security or claim that the plaintiffs have against the vessel; there being no statutory authority for entry of judgment against the sureties without giving them their day in court (overruling *Id.*, 57 Wash. 550).

MOUNT, PARKER, DUNBAR, and CROW, JJ., dissent.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered February 18, 1909, upon findings in favor of the plaintiff, in an action to foreclose a lien on a vessel. Reversed.

¹Reported in 111 Pac. 1050.

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Opinion Per RUDKIN, C. J.

Chas. E. Miller, for appellants.

Welsh & Welsh, for respondent.

ON REHEARING.

RUDKIN, C. J.—This was an action to foreclose a lien on a vessel for the purchase price of material used in its construction. The complaint alleged that the owners were about to remove the vessel beyond the jurisdiction of the court, and a receiver was appointed to take charge of the property *pendente lite*. After the appointment of the receiver, the defendants in the action petitioned the court to release the vessel, upon their substituting a bond in the penal sum of \$1,500 in its place and stead. The prayer of this petition was granted and the defendants filed a bond with the appellants herein as sureties, conditioned that the defendants would discharge and perform the judgment of the court in the foreclosure action. The bond also contained this further condition or stipulation:

“It being one of the conditions of this obligation that this bond and the personal liability of the principals and sureties thereon shall be and become and are substituted for any security, or claim which the said Kalb-Glibert Lumber Company may have against said vessel ‘Doris’ aforesaid, her tackle, apparel and furniture, and that said action may proceed in all manner as though said vessel remained within the jurisdiction of the above entitled court, as this bond and the principals and sureties aforesaid, are hereby substituted for and taking the place of said vessel.”

The vessel was released pursuant to this bond, and upon the trial of the action judgment was given against the original defendants and against the appellants as sureties on the bond in the sum of \$1,067 and \$25 costs of suit. From this judgment the sureties appealed, and the judgment was affirmed in one of the departments of this court, *Kalb-Glibert Lumber Co. v. Cram*, 57 Wash. 550, 107 Pac. 381, after which a hearing before the court *en banc* was granted. The appellants were not served with process in the court below, and made no

appearance in the action, so that the authority and jurisdiction of the court to render judgment against them must be found in the terms and conditions of the foregoing bond. While the cases may not be strictly analogous, a majority of the court are of opinion that the principles announced in *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643, *Noble v. Whitten*, 34 Wash. 507, 76 Pac. 95, and *Davis v. Virges*, 39 Wash. 256, 81 Pac. 688, are absolutely controlling here. In *O'Connor v. Lighthizer*, the lower court gave judgment against the sureties on a cost bond, required of a nonresident plaintiff under Rem. & Bal. Code, § 495, and in discussing the legal effect of such a judgment this court said:

“The only statutory provisions relating to the bond for costs in the superior court of which we have any knowledge, are found in § 5186, Bal. Code. That statute makes no provision for the entry of judgment as of course against the sureties, in the same action in which the bond is filed. Without such express statutory authority as entering into, and becoming a part of, the contract in the bond, whereby the sureties consent to such judgment, we believe judgment cannot be entered against them; and they are not, therefore, parties appearing in the action upon whom notice of appeal is required, within the meaning of § 6504, Bal. Code. Not being persons against whom judgment may be entered as of course by statutory authority, they are entitled to their day in court. An attempt to enter an of-course judgment against the sureties is without notice and void; but one may appeal from even a void judgment for the purpose of having it judicially determined as void.”

In *Noble v. Whitten*, speaking of the point decided in the *Lighthizer* case the court said: “It was held that, in the absence of express statutory authority for entering judgment against the sureties, the power to do it does not exist, and that such judgments when entered are void.” In *Davis v. Virges*, *supra*, a supersedeas bond was given, conditioned that the appellants would pay the amount awarded by the judgment on appeal, and that, “If the appellants do not make such payment within thirty days after the filing of the remittitur

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from the supreme court, judgment may be entered on motion of the respondents in their favor against the undersigned sureties, for the said sum of \$750, together with \$45.95 costs, together with \$. interest that may be due thereon, and the damages and costs which may be awarded against the appellants upon the appeal." After the cause was remitted, the court below entered judgment against the sureties on an oral motion and notice, but that judgment was reversed by this court on appeal. Among other things the court said: "There is no provision of law authorizing the lower court to enter a judgment in this summary way upon a statutory bond given on appeal to this court." And, after quoting from the *Lighthizer* case to the same effect, the court added:

"Counsel for respondents argue that, because the bond provides that judgment may be entered against the sureties upon motion, for the amount due from the principal, therefore the lower court had jurisdiction to enter the judgment as of course. It is sufficient answer to this to say that this bond is a statutory bond. The provision under consideration was not required by statute. Its insertion, therefore, was a mere gratuity which added no legal right nor liability. It was surplusage. If this provision may be held to confer a right to enter a judgment, as of course, without an action upon the contract, the same rule would permit a judgment upon any contract when it is stated that judgment may be taken upon default of the terms of the contract. This can never be a just and equitable rule, and is not permitted. The debtor must be given his statutory notice by summons, so that he may have his day in court."

It seems to us that the provisions of the bond in that case were broader and conferred greater powers on the court than does the bond now before us. The stipulation that the bond and personal liability of the principals and sureties were substituted for and in the place of the vessel is only what the law would imply in the absence of such a stipulation. In redelivery bonds of all kinds the bond is substituted for the property, but the power to render personal judgment against the

sureties in such cases is expressly given by statute, whenever the legislature intends that such a power shall exist. In entire harmony with our own decisions on this question, see: *Selby v. McQuillan*, 45 Neb. 512, 63 N. W. 855; *Campbell v. May*, 31 Ala. 567; *Garrott & Brooks v. Fuller*, 36 Ala. 179; *Creanor v. Creanor*, 36 Ark. 91; *Walker v. Walker*, 42 Ga. 141.

In *Walker v. Walker*, *supra*, the court said:

"Can judgment be entered up against the securities on the bond given in this case, at the same time with the rendition of the decree against the principal? This is an important question, and we have considered it carefully upon principle and authority.

"The Code, section 3243, in cases of attachment, provides for replevy bond, and that 'it shall be lawful for the plaintiff to take judgment against the defendant and his securities upon said bond.' Section 3513 declares: 'In all cases of appeal, where security has been given, the plaintiff, or his attorney, may enter up judgment against the principal and surety jointly and severally.' Section 3488 provides, in cases of bonds given to dissolve garnishment, 'the plaintiffs may enter up judgment, upon such bond against the principal and securities, as judgment may be entered against securities upon appeal.' Section 3982 makes provision in cases of bond given on issuing certiorari, that the security on said bond shall be liable as securities on appeal. And such special provision is made in relation to matters arising on writ of error where bond is given, and in matters appealed from the Ordinary: Section 3563.

"But in this case the law is silent, and we are, therefore, left to the principles of the common law, except by reason and analogy we are enabled to bring the case within the application of the sections quoted. Upon the proposition of law found in 1st Kelly, 72, we may conclude that the amount found against the principal is the amount fixed against the sureties, and why multiply suits to settle what may be regarded beyond controversy. The spirit of the law is to disencumber legal rights from unnecessary formalities, and to apply the principle would be easy and embrace all cases standing under the provisions of securities. But no matter how

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simple the process, or how apparently reasonable, to accomplish it, it requires a legislative, not a judicial act. We have no power, as a court of errors, to make law; the limitation of construction is to laws existing. And inasmuch as at common law no such provision exists and our code does not provide legislation to embrace it, every reason fails to invoke its exercise upon our part."

It has been argued that this is an equitable proceeding, and that the law actions cited have no application. We do not think that any such distinction exists. It will be conceded that a court of equity may proceed in a more summary manner to fix and enforce the liability of sureties on bonds given in judicial proceedings before it, but the essential requirement of notice and opportunity to be heard may not be entirely dispensed with. Where the statute provides that judgment may be entered against the sureties, the statute enters into and forms a part of every bond taken under its provisions, and the judgment finds its warrant in the statute and not in the contract. Statements will be found in some cases to the effect that judgment may be entered against sureties when there is a specific provision in the bond or by statute or rule of court to that effect, such as *Russell v. Farley*, 105 U. S. 433; but with us as held in the *Davis* case, *supra*, a mere simple contract cannot authorize the entry of a judgment against the obligor without previous notice or trial. In the absence of statute, such a stipulation would at least require the formalities demanded by our statute for a confession of judgment. If the question were an open one, we would feel disposed to hold that the sureties might be brought into the original action by any reasonable notice, such as a show cause order; but the question is one of practice only, and we will follow the rule announced in the *Davis* case, namely, that the parties can only be brought in by summons. From what we have said, it follows that the judgment against the sureties must be reversed and the cause remanded for further proceedings. It is so ordered.

FULLERTON, MORRIS, GOSE, and CHADWICK, JJ., concur.

MOUNT, PARKER, DUNBAR, and CROW, JJ. (dissenting)—If the appellants had made no appearance in this case, we might agree with the conclusion reached by the majority opinion at this time. But, as stated in the opinion rendered upon the former hearing, and reported in 57 Wash. 550, 107 Pac. 381, the appellants voluntarily appeared in the case before they were substituted for the vessel. They executed a bond by which they agreed that they might be "substituted for and take the place of said vessel." Thereupon a petition which included the bond was filed, asking the court to make a substitution, and by reason of that petition and the appearance of the appellants at that time, an order of substitution was made and the vessel was released. The vessel was in possession of and within the jurisdiction of the court.

The appellants were in court and said, in substance: "Take us and take our property in place of said vessel. Release the vessel so that it may leave the jurisdiction of the court. Our property will stand in its stead." Thereupon, over the objection of the respondent and solely by reason of the representations that the bond and personal liability of the appellants "shall be and become and hereby are substituted for any security or claim which the said plaintiffs . . . may have against said vessel," the court made the order of substitution.

In the face of these declarations, and in the face of the fact that the vessel was thereby released and left the jurisdiction of the court and changed the status of the case, should the appellants now be heard to say that they have not appeared in the case, that they were not substituted for the vessel, and did not take the place of the vessel, and that the only remedy which the respondent now has is another suit upon the bond? It is true, that the bond given in this case was not a statutory bond. The court was not required to substitute the bond for the vessel. Whether he should do so or not was within his discretion. If before the substitution was made the court had supposed that the filing of the bond was not the personal appearance of the appellants, and the personal liability of the

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sureties could not be made to take the place of the vessel without another action against the appellants, we have no doubt the order would not have been made. For no just judge would release the vessel under the circumstances here disclosed, and without any accruing benefit thereby, drive the respondent to another action in order to secure the fruits of its litigation then pending. The trial judge and all the parties to the action supposed that the appellants had appeared in the action and could be substituted for the vessel, for the petition was to that effect. The order made upon the petition was to that effect. The bond itself was to that effect; and the court, at the end of the case, rendered judgment against appellants instead of the vessel. The fact that the appellants had appeared in the case no doubt influenced the discretion of the court to grant the order. The appellants having appeared and become parties to the action, the judgment was properly rendered against them and should be affirmed.

We therefore dissent.

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[No. 8804. Department One. November 30, 1910.]

J. W. PRICE, *Respondent*, v. CLALLAM COAL COMPANY,
Appellant.¹

WORK AND LABOR—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant the verdict of a jury in favor of plaintiff for work and labor, where the amounts due and sums paid are admitted or established by uncontroverted evidence, and the process of addition and subtraction determines that the defendant had overpaid the plaintiff and was entitled to a counterclaim.

Appeal from a judgment of the superior court for King county, Gay, J., entered December 18, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

¹Reported in 111 Pac. 898.

Frank A. Noble, for appellant.

Holzheimer, Herald & Holzheimer, for respondent.

RUDKIN, C. J.—On the 9th day of September, 1908, the plaintiff and defendant entered into a written contract, whereby the plaintiff agreed to drive a rock tunnel in a certain coal mine or claim, owned by the defendant in Clallam county. The tunnel was to be driven 500 feet, more or less, as the defendant might direct, at a cost of \$14 per lineal yard. At the time of the execution of the contract the plaintiff deposited with the defendant the sum of \$300 to secure its faithful performance according to its terms. Work commenced under the contract in October, 1908, and was abandoned by direction of the defendant in February, 1909. The present action was instituted to recover the \$300 deposited as security, and the further sum of \$55.75, for services performed by the plaintiff as a coal miner, under a separate contract. The answer consisted of denials, and a counterclaim in favor of defendant in the sum of \$15.05 in excess of the several amounts claimed by the plaintiff. The case was tried before a jury, and from a judgment in favor of the plaintiff in the sum of \$344.60, the defendant has appealed.

The principal assignment of error, and the only one we feel called upon to consider, is the insufficiency of the evidence to justify the verdict and judgment. This assignment must be sustained. Under the testimony, the respondent claimed credit for the following items: Amount of deposit \$300; driving 137 yards of tunnel, at \$14 per yard, \$1,918; labor claim, mentioned in the second cause of action, \$55.75. The first and third items are not disputed, but the second is not established by any competent testimony. The respondent bases his claim for 137 yards of tunnel construction on certain monthly statements furnished by the superintendent of the appellant company, who was confessedly a secret partner of the respondent in this undertaking. The respondent offered no other testimony as to the length of tunnel driven by

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him. He called the superintendent as a witness in his behalf, but the latter admitted that the statements furnished by him were excessive and incorrect, and were so turned in for the reason that the respondent was running behind on his contract. On the other hand, two witnesses for the appellant testified that they measured the tunnel as driven by the respondent, and that the entire distance driven was 113 1-3 yards, and no more. There is no competent testimony to the contrary. The respondent's side of the account therefore stands thus: Amount of deposit \$300; driving 113 1-3 yards of tunnel at \$14 per yard \$1,586.66; labor claim in second cause of action, \$55.75; total, \$1,942.41. As against this, the following offsets are either admitted or established by uncontroverted testimony: For powder, \$517; labor claims, \$919.55; board, \$871.65; paid to respondent, \$209.80; total \$2,018; leaving a balance in favor of the appellant in excess of the \$15.05 claimed in its answer. This result is based, not on conflicting testimony, but on the simple process of addition and subtraction, against which the verdict of a jury cannot prevail.

The judgment of the court below is therefore reversed, with directions to dismiss the respondent's complaint, and enter judgment in favor of the appellant in accordance with the prayer of its counterclaim.

FULLERTON, GOSE, MOUNT, and PARKER, JJ., concur.

[No. 9100. Department One. November 30, 1910.]

G. A. SINGER *et al.*, *Appellants*, v. GUY INVESTMENT
COMPANY, *Respondent*.¹

VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD OF AGENT—EVIDENCE OF RELATION—SUFFICIENCY. In an action by vendees to recover earnest money, paid upon representations of the alleged agent of the vendor, the evidence sufficiently shows that such agent was the agent of the vendees where the agent testified that he was representing the vendees, who did not deny the same, and the agent in a letter objected to defects shown by the abstract.

PRINCIPAL AND AGENT—EXISTENCE OF RELATION—EVIDENCE OF AGENT. The declarations of an agent as to whom he represented are competent where they form part of his testimony in the case.

VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD—EVIDENCE—ADMISSIBILITY. In an action to recover earnest money, paid on false representations by and through certain maps that lots were contiguous, it is not error to sustain an objection to a question as to where plaintiffs' agent got the maps, where no offer was made to show that the maps did not come from the defendant or its agents and it appears that they did not.

SAME—DEFECTS IN TITLE—ABSTRACT. In an action to rescind a sale for defects in the title, an objection that the abstract does not show whether a certain grantee in the chain was married or single is unavailing where such grantee made affidavit that she was a widow when she received the title.

SAME. Upon objection to an abstract upon one specified ground, other grounds are waived.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 8, 1909, in favor of the defendant, in an action on contract. Affirmed.

John H. Allen, for appellants.

Fred H. Peterson and *Philip D. Macbride*, for respondent.

Gose, J.—Plaintiffs instituted this action to recover earnest money paid upon a real estate contract, and have appealed from a judgment entered against them.

¹Reported in 111 Pac. 886.

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Opinion Per Goss, J.

The contract is as follows:

"R. C. Erskine, Real Estate and Loans, 712 New York Block.

"Seattle, Wash., March 10th, 1909.

"Received from Mr. G. A. Singer five hundred (\$500) dollars, being a deposit to secure the purchase of lots three (3) and four (4), block four (4), Randall's Addition, and lot thirteen (13), block seventeen (17), Randall's Third Addition to the City of Seattle, for eight thousand (\$8,000) dollars on the following terms: Five hundred (\$500) dollars as herein receipted for; seven thousand five hundred (\$7,500) dollars within ten days from delivery of an abstract showing good title.

The Guy Invest. Co.

"If given for earnest money, the conditions on the back of this receipt are referred to and made a part hereof.

"\$500. R. C. Erskine & Company.

(On the reverse side):

"Rents and interest on mortgages, if any, are to be apportioned from date deed is delivered. An abstract of title is to be furnished and ten days allowed for examination. If the title to the said premises is not good, or cannot be made good within 30 days, or if the owner does not approve the above sale, this agreement is void, and the earnest money herein receipted for shall be refunded. But if the title to the said premises is good, and the sale is approved by the owner, and the purchaser fails to comply with any of the conditions of this sale, then the earnest money herein receipted for shall be forfeited to R. C. Erskine and owner equally.

"The property is to be conveyed by good and sufficient warranty deed of conveyance, free and clear of all liens and incumbrances of every nature whatsoever, no exceptions of any nature, save only that the purchaser has consented to assume one-half of not to exceed \$350 of taxes and assessments.

"Time is the essence of this contract.

"R. C. Erskine & Company, Agents.

"I hereby agree to purchase said property on the above terms and pay \$8,000—as herein specified. G. A. Singer, Purchaser.

(Endorsed:)

"I have received the within deposit, accept the terms of this sale and agree to pay to Guion & Company for equal division

with R. C. Erskine & Company the regular commission when the deal is closed The Guy Invest. Co., Owner."

The complaint charges that the abstract of title to the property discloses that the respondent's title "was defective in several particulars," and that there is "a strip of about ten feet wide between lots 3 and 4, block 4, Randall's Addition, and lot 13, block 17, Randall's Third Addition," to which it had no title and that at the time the contract was made the respondent represented to appellants that the lots were contiguous, and that they relied upon the representation.

The contention is that the contract which we have set forth, supplemented by the parol testimony, discloses that R. C. Erskine was the agent of the respondent; and that, if he was not actually its agent, he assumed to act for it, and that, having accepted the benefits of the contract, it is holden for his representations. The evidence clearly shows that the map which Mr. Erskine had showed the lots to be contiguous, and that he represented to the appellants, that the property was a compact tract. It also appears that the appellants informed him that they were purchasing the lots for a residence, and that they wanted contiguous property. There is a narrow, wedge-shaped strip of land between the two additions, having a width of about ten feet at one end and about one foot at the other. In making the representation, Erskine relied entirely upon his maps. We think, however, the learned trial court correctly resolved the case upon the facts, in holding that Erskine was the appellants' agent. There is nothing in the written instrument indicating that he was acting for the respondent. It is true that R. C. Erskine & Company signed the contract as agents, but for whom, the instrument does not disclose. The respondent signed both the receipt for the earnest money and the acceptance of the terms of the contract. The appellant husband also signed for himself. It is, therefore, apparent that the signature of Erskine & Company affords no presumption that it acted for the respondent. Nor can it be said that the provision for a division of the com-

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mission, in the light of the evidence, is of any probative force in favor of the appellants. The contract was delivered to them, and they must be held to have knowledge of its contents. *Dormitzer v. German Sav. & Loan Society*, 23 Wash. 132, 62 Pac. 862.

The appellant husband testified that, in making the purchase, he dealt with Erskine, and paid him the earnest money. Mr. Erskine testified that, "Mr. Singer was looking for a good corner, and I submitted various corners to him and finally he decided that he was willing to pay the price . . . shown in the earnest money receipt, and *we* submitted that proposition to Mr. Guy through his agent, and the deposit was accepted;" that he was acting for Mr. Singer; that Guion & Company was the agent of the respondent; that the sign of the latter was on the land, and through courtesy he submitted the appellants' offer to it; that he had had no previous conversation, either with Guion & Company or with the respondent, relative to the property. Mr. Goddard, who acted for Guion & Company in the transaction, testified that Mr. Erskine rang him up to inquire if they had the property for sale; that he informed him that Guion & Company represented Mr. Guy who owned the property, and that Mr. Erskine said, "he had a purchaser for it if it could be had at a certain price, and wanted to get our price;" that he supposed Erskine represented Mr. Singer; "he said he was. I only knew what Mr. Erskine told me, that he was representing Mr. Singer. That's all I know about it. He told me he was representing Mr. Singer." Erskine paid the earnest money to Goddard, and through the latter the contract was executed by the respondent, returned to Erskine, and by him delivered to appellants. The appellant husband does not deny Erskine's statement that the latter was his representative, nor does Erskine deny that he told Mr. Goddard that he was acting for the appellants. Indeed, we think that the evidence clearly discloses that all the parties to the transaction regarded Erskine as the agent of the appellants. This view is strengthened by the

following letter written by Erskine & Company to Mr. Goddard:

"April 5, '09.

"Mr. Ralph Goddard, Agent for G. O. Guy,
Guion & Company, Seattle.

"Dear Sir: Mr. G. A. Singer, who has personally notified you by means of his attorney's opinion, of certain defects in the title to lots 3 and 4, block 4, Randall's Addition, and lot 13, block 17, Randall's Third Addition, has requested me, in his attorney's absence from the city, to inform you of a further defect in that the lots are not contiguous, a strip of unplatted land extending between the two additions. Yours very truly, R. C. Erskine & Company."

The declarations of an agent as to whom he represented are competent evidence where they form a part of his testimony in the case. *Service v. Deming Inv. Co.*, 20 Wash. 668, 56 Pac. 837. In *Bender v. Ragan*, 53 Wash. 521, 102 Pac. 427, in considering this question, we said:

"Appellants argue, and cite some authorities to the effect, that agency cannot be proved by the declarations of the agent. The rule has no relevancy to this case, because here the agent testified directly as to his authority. He was competent to so testify, as much as the principal."

The court distinguished such testimony from the declarations of the agent as to his agency when such declarations were sought to be proved by a third person. As was said in the *Service* case, counsel will be permitted to cross-examine as to the grounds upon which the conclusion or opinion is based. But if we should reject the statement of Erskine that he was representing the appellants, we think the evidence warranted the court in reaching that conclusion. The view we have taken upon the facts makes it unnecessary to review the appellants' authorities. They all proceed upon the principle that the party either was or assumed to be the agent of the party sought to be charged with liability.

While upon the witness stand Mr. Erskine, in the redirect examination, was asked where he procured the maps which showed the lots to be contiguous. An objection to this ques-

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tion was sustained. This, the appellants assert, was error. No offer was made to show that they came through the respondent or its agent Guion & Company. Moreover, we think the subsequent testimony shows that they did not come from such source. It is not shown that either Guion & Company or the respondent made any representation to either the appellants or Erskine as to the situation of the property, other than the written contract. There was no error in the ruling.

Finally, it is contended that the abstract of title does not show whether a certain grantee in the chain of title was married or single when she acquired the property. There are two answers to this contention. First, we think the evidence was supplied in the form of the affidavit of the party that she was a widow when she acquired the title and that as such she conveyed it. The learned trial court, in passing on this objection to the title, aptly observed that "her statement under oath, that she was a widow at the time she obtained title to the property would certainly be as binding as the mere recitation in the deed" to that effect. Second, we think the inference from all the evidence is that all the objections to the title, other than the question of the contiguity of the property, were waived.

The judgment is affirmed.

RUDKIN, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 8936. Department One. November 30, 1910.]

M. B. HAGE, *Respondent*, v. FRANK W. LUEDINGHAUS *et al.*,
Appellants.¹

MASTER AND SERVANT—NEGLIGENCE OF VICE PRINCIPAL—ORDERING SERVANT INTO DANGEROUS PLACE—EVIDENCE—SUFFICIENCY. A signalman is not directly ordered by a vice principal to go into the bight of a logging cable to give a second signal, where he was simply signaled to start the engine, and could choose his place for giving the signal.

MASTER AND SERVANT—INCOMPETENT FELLOW SERVANTS—EVIDENCE—SUFFICIENCY. A "fireman" is not necessarily incompetent to run a donkey engine, where no particular skill was required and it is usual for either the engineer or the fireman to run it; and in the absence of evidence of his incompetency, it is not negligence to permit him to run the engine.

SAME. A single act of negligence is not sufficient to show that a fellow servant was incompetent.

MASTER AND SERVANT—FELLOW SERVANTS. A man running a donkey engine in a logging camp, and his signalman, are fellow servants.

MASTER AND SERVANT—NEGLIGENCE OF MASTER—SAFE APPLIANCES AND METHODS. Where it is not necessary for a signalman in a logging camp to go into a dangerous place to give a signal by hand, the master cannot be charged with negligence in failing to supply a whistle wire to give the signals.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered February 8, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a logging camp. Reversed.

James B. Murphy, Graves & Murphy, and C. H. Winders,
for appellants.

G. E. Hamaker, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries alleged to have resulted to the plaintiff from the

¹Reported in 111 Pac. 1041.

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negligence of the defendants while working for them as a chaser and signalman, in their logging operations in Lewis county. By his complaint, the plaintiff alleges negligence on the part of the defendants as follows:

"That on or about the 13th day of April, 1909, the plaintiff while engaged in his duty as a chaser in said crew as was customary was stationed by S. Hover, the hook-tender of said crew, and vice principal of defendants, at a point about 100 feet distant from the donkey engine, along and near the wire cables extending from the donkey engine, to a log attached thereto. That between the place where plaintiff was stationed as aforesaid and said wire cable, there was a large fir tree and it was the duty and custom acting under orders of said Hover, to take and receive orders and signals from said hook-tender S. Hover and then go to a place where plaintiff could be seen by the engineer and communicate the same to him, by means of waving his hand; that the only place plaintiff could communicate the order and signals to the engineer was a place on the same side of the said tree that the wire cable was on, said place being a place attended with great danger of being injured by being struck with the wire cable when the donkey engine was started, and it was the duty and custom of the donkey engineer to take and receive the signals from plaintiff from said place, and then wait until plaintiff could go to the opposite side of the tree from where the cable was situated, a safe place, before starting the engine to draw a log in; that on said date the plaintiff in pursuance of his duty, and orders from said hook-tender, received a signal and order from said hook-tender and vice principal of defendants, who directed him to go on the same side of the said tree where said wire cable was situated and communicate the same to the engineer or person in charge of the donkey engine, said order or signal being to start the engine to draw in the log, and while plaintiff was in the act of carrying out his orders received as aforesaid, plaintiff was in the act and duty of raising his hand to signal the engineer, when the engineer, or person in charge of the engine, without waiting for plaintiff to go behind said tree, his said place of safety, and without warning, suddenly and violently started said donkey engine, causing the wire cable to swing violently, striking plaintiff's face, causing the loss of 13 teeth, breaking and causing the loss of 4 large

pieces of bones of the lower jaw, cutting and bruising his face, and permanently disfiguring plaintiff's face for life.

"That the person who was in charge of said donkey engine, and who was operating the same, when plaintiff was injured as aforesaid, was said fireman, who is known to plaintiff as Tom Powers and sometimes known as Tom Rouse, but whose true name is unknown to plaintiff, but is known to the defendants, that he was careless, negligent, and incompetent in the discharge of his duties as engineer, and he never had any experience as a donkey engineer, and was not an engineer at all, and that his carelessness, negligence and incompetency, was well known to the defendants, and the regular engineer, vice principal of the defendants, yet the said defendants, the said Sanders the regular engineer and vice principal of defendants, and the said Hover, hook-tender and vice principal of defendants, retained him in their employment and entrusted him with the duty of running, operating and handling said donkey engine, and taking and receiving orders and signals from plaintiff.

"That the carelessness, negligence and incompetency of said person in charge of said engine at the time the plaintiff was injured as aforesaid, was wholly unknown to plaintiff at that time.

"That it was the duty of the defendants to provide a reasonably safe place for the plaintiff to work, and the duty of reasonable inspection to see if that condition is preserved, and the duty to employ a competent engineer at all times to run and operate said donkey engine, all of which the defendants, their agents, servants and vice principals carelessly and negligently failed, neglected and omitted to do; and it was entirely owing to the carelessness and negligence of the defendants, their agents, servants and vice principals to provide a safe place for plaintiff to work, and reasonable inspection to see that that condition was preserved, and the negligence of said S. Hover hook-tender and vice principal, in directing and ordering plaintiff into the dangerous place where he was injured; and the carelessness and negligence of the defendants in employing a careless negligent and incompetent engineer to run and operate said donkey engine; and the carelessness, negligence and incompetency of said Tom Powers, sometimes known as Tom Rouse, whose true name is unknown to plaintiff, the person who was employed and allowed to run and operate said engine, in failing to give plaintiff time to reach

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his aforesaid station of safety, and his suddenly and violently starting said engine without warning or in any manner allowing plaintiff to escape from said danger, that plaintiff was injured.

"That the danger attending plaintiff's obeying the order of said hook-tender, and going to said place to give said signal to the said person in charge of said engine, was not apparent to the plaintiff, and was not such as ordinary care and prudence on the part of plaintiff could have avoided."

By their answer the defendants deny the negligence charged against them and affirmatively plead contributory negligence and assumption of risk on the part of plaintiff, also that plaintiff's injuries, in so far as they resulted from the negligence of any one other than himself, were the result of the negligence of his fellow servant. A trial before the court and a jury resulted in a verdict and judgment for the plaintiff in the sum of \$1,420.83, from which the defendants have appealed.

The principal contentions of learned counsel for appellants are that the trial court erred in denying their motion for a nonsuit at the close of respondent's evidence, and in denying their motion to withdraw the case from the consideration of the jury and for judgment in appellants' favor at the close of all of the evidence. These contentions call for an examination of the evidence touching respondent's allegations and contentions; (1) that he was ordered by the hook-tender into a dangerous place; (2) that the appellants negligently employed an incompetent person to run the engine; (3) that the engine was negligently started by such incompetent person; and that all of these negligent acts concurring, caused the injury. Let us notice each of these in order, in the light of the evidence viewed most favorably to respondent's contentions.

Was respondent ordered into a dangerous place? Appellants were engaged in logging operations, and respondent, who was experienced in the work, had been employed by them several days as chaser and signalman. The crew with which

he was working was using a donkey engine and wire cable in the usual manner, engaged in drawing logs from the woods for loading upon cars. The crew was in immediate charge of a hook-tender, whom it may be conceded was vice principal and not a fellow servant of respondent. It was the duty of the respondent as signalman to be stationed at some convenient point between the hook-tender and the engine, and receive signals from the hook-tender and communicate them to the man in charge of the engine, thus directing the starting of the engine when the cable is attached to a log ready for moving it. The necessity of having such a signalman arises from the fact that the hook-tender, whose duties require him to be at the end of the cable, is usually out of view from the engine, as he was in this instance. The signalman is free to choose his own station, the only requirement being that he is expected to station himself so that he can readily communicate the signals from the hook-tender to the engine. At this time the respondent was communicating the signals by motions with his hands, which is one of the very common ways of such communication. It is more or less dangerous to be near the cable when the engine is pulling upon the cable, especially when starting to pull upon it, as it is liable to swing with great force to one side or the other or upward. This was well known to respondent.

On the day respondent was injured, the crew in which he was working had commenced to operate at a new place, the road for the logs being cleared, only a few logs having been hauled over it. The cable was extended out from the engine about 200 feet, and was attached to a log by the hook-tender at a point out of view from the engine. Respondent was stationed at a convenient place for communicating the signal to start, and received and communicated such signal. He says he received and communicated this signal to start the engine, while standing upon a log near the engine. It is not claimed that this was a dangerous place. For some cause the engineer did not start promptly upon the giving of

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this signal. The hook-tender then moved from his position so that respondent could not see him. Respondent then passed over the cable and stood behind a large tree where he could see the hook-tender, where he soon received another signal to go ahead from the hook-tender, the engine not having yet started. Respondent then stepped out from behind the tree near the cable to give the man at the engine another signal, and while his hands were up for the purpose of attracting the attention of the man at the engine, the engine started, and the cable swung and struck respondent. Respondent does not seem to know the immediate cause of the cable swinging, but another witness says the cable caught in a root upon the ground, which gave way upon the tightening of the cable. Respondent says that the man at the engine did not look up when he gave the second signal. It is apparent that the engine started in response to the first signal, after some delay, and without the man at the engine seeing the second signal. Respondent claims his purpose was to give the second signal and then get back behind the tree away from the cable before the engine started. He claims it was customary for the man at the engine to wait until the signalman got away from the cable before starting the engine whenever a signal was given from a point near the cable. As to the necessity of respondent's going near the cable to give the signal, the following is substantially all the information he gives us on that subject:

"Q. You may state whether or not there was any other place where you could go and take and receive signals from the hook-tender and communicate them to the engineer that it could be done properly. A. Why, I made a couple of attempts to get up on the other side of the line. But I was not accustomed to running on that side. As I stated I made a couple of attempts to get up there but the brush and one thing and another checked me. I did not take any further view of the positions around there after that. Q. Then Mr. Hage where you were standing at the time you gave that signal looked like a reasonably safe place to you? A. Yes,

sir. Q. And you did not anticipate that the line was going to hurt you. A. No, sir. Q. Now, if you had anticipated that that was a dangerous place, you would not have gone there? A. No, sir. Q. You would have gone somewhere else? A. I would have waited. Q. You would have gone somewhere else where you could have been seen or gone on high land? A. I would have waited or went around. Q. There was other places that was not an impossibility? There might have been other places? A. It was not impossible that I could not have gone some other place in that neighborhood, but I would have had to have been on that particular ridge."

Touching this matter, one of respondent's witnesses testified as follows upon cross-examination:

"Q. Could he have given the signals from anywhere about that? A. He could have given the signals from any point that he could have been seen from the donkey engine. Q. Could he have been seen from any other position? A. He certainly could. Q. Isn't it a fact that there was two or three acres where he might have been seen and from where he could have given the signals? A. Well, I do not like to say that there was that much ground. Q. Well, how much? A. The fact is that he could have stood anywhere he could hear the hook tender give the call and be seen by the donkey driver; at any point that he could hear the signal as it came from the woods and transmit it properly to the donkey driver. Q. Was there any other place a safe distance from the line where he might have stood and given signals? A. Yes, sir. Q. And might have stood and heard the hook-tender? A. Yes, sir."

There is practically no other evidence upon this subject. Respondent's story is somewhat involved touching the question of being ordered into a dangerous place by the hook-tender, but we are unable to give it a version more favorable to his contention than this summary. The contention seems to be, not that the hook-tender directly ordered him into a dangerous place but that the facts we have summarized above show that the hook-tender's signals given at the time, under these circumstances resulted in the respondent going into a dangerous place. Conceding that the facts occurred as

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claimed by respondent, it seems to us quite clear that this was not ordering him into a dangerous place to give the signal to the man at the engine. Respondent was still free to give the signal from any convenient place he might choose, and he does not state or show by other witnesses that it was necessary to give the signal from this place. It also appears that he was well aware of the dangers of the cable, generally.

Some contention is made that the evidence shows that the position of the cable had been changed just before the accident, at a point between respondent and the log to which it was attached, in such manner as to render it more liable to swing towards where he gave the signal, and that this change was unknown to him. None of the evidence offered in behalf of the respondent shows any such change. The contention is based upon the testimony of the hook-tender, offered by appellants after respondent's case was rested, to the effect that the cable was in a different position than that testified to by the respondent. They simply differ as to the location of the cable. Nor is there any evidence that respondent did not have every opportunity to know of the position of the cable. Indeed, his duties were such as to give him good opportunity to be informed as to its location. We are of the opinion that, taking all of these facts as they are claimed to have existed by respondent, they fall far short of being sufficient to support a conclusion that he was ordered into a dangerous place.

Did appellants negligently employ an inexperienced man to run the engine? The evidence shows without conflict that the engine was run by the fireman as well as the engineer, sometimes by one and sometimes by the other; that it did not take an experienced engineer to run this kind of an engine; that a man may be a competent "donkey driver", as they are called, without being an engineer; and that this fireman could properly handle the engine as a donkey driver. There is no evidence of his lack of ability or incompetency in this regard except such as might be inferred from the manner in which he started the engine at the particular time respondent was in-

jured. This is not sufficient to support a conclusion that the appellant was negligently employing an incompetent donkey driver. The alleged incompetency was based upon nothing more than the single act of negligence, conceding it was such, occurring at the time of the injury. *Long v. McCabe & Hamilton*, 52 Wash. 422, 100 Pac. 1016; 8 Ency. of Evidence, 533-535.

Some courts seem to hold that the act of the fellow servant resulting in the injury may be of such a flagrant character that only an unfit servant could have committed it. But we are not here dealing with any such flagrantly careless act. It is unnecessary here to express any opinion as to the soundness of this doctrine. It is noticed in 1 Labatt, Master and Servant, § 189. It is clear there was not sufficient evidence to support a finding that appellants were negligent in employing this fireman and permitting him to run the engine.

We need not express any opinion upon the question of the fireman's alleged negligence in starting the engine. He and respondent were fellow servants, and therefore the appellants, under the previous holding of this court, were not liable for this alleged negligence of the fireman. *Millet v. Puget Sound Iron & Steel Works*, 37 Wash. 438, 79 Pac. 980; *Stevick v. Northern Pac. R. Co.*, 39 Wash. 501, 81 Pac. 999; *Grim v. Olympia Light & Power Co.*, 42 Wash. 119, 84 Pac. 635; *Berg v. Seattle, Renton & Southern R. Co.*, 44 Wash. 14, 87 Pac. 39, 120 Am. St. 968; *Taylor v. Washington Mill Co.*, 50 Wash. 306, 97 Pac. 243; *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405.

Learned counsel for respondent call our attention to *Conine v. Olympia Logging Co.*, 42 Wash. 50, 84 Pac. 407, and *Westerland v. Rothschild*, 53 Wash. 626, 102 Pac. 765, in support of his contention that appellants would be responsible for the negligence of the fireman in starting the engine. A critical examination of those cases, however, will show

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that there was concurring negligence of the master in failing to cause the signal to be properly communicated; the injured servant being entirely beyond the view of the man at the engine, and having to depend upon such means of communication as the master furnished. In this case, the respondent, as signalman, was in direct communication with the man at the engine, using a very common method for such communication.

It is contended that appellants were negligent in not furnishing respondent with a whistle wire for signal purposes—that is, a wire attached to the engine whistle and running out to where respondent was stationed, so that he could give signals at a safe place away from the cable. It seems to us that even though we assume that there may sometimes be conditions where the furnishing of such wire would lessen the dangers to the signalman, it is not shown here that it was necessary to go into a dangerous place to give the signals by hand, which it is plain was a very common method of signaling.

We cannot escape the conclusion that the evidence here relied upon by respondent is wholly insufficient to support the verdict and judgment. We have dealt with the facts as though undisputed, in the most favorable light possible to respondent's contention. It follows that the learned trial court was in error in refusing to withdraw the case from the jury and enter judgment for appellants at the close of all the evidence.

The judgment is reversed, with directions to enter judgment for appellants in compliance with their motion.

RUDKIN, C. J., FULLERTON, GOSE, and MOUNT, JJ., concur.

[No. 9035. Department One. December 1, 1910.]

PETE NELSON, *Appellant*, v. BALLARD LUMBER COMPANY,
Respondent.¹

MASTER AND SERVANT—NEGLIGENCE—PLEADING—ISSUE. The failure to prove one particular ground of negligence by a master is not ground for nonsuit, where the injury resulted from a combination of various acts, which combined might be negligent, although none of the acts considered alone were negligent.

MASTER AND SERVANT—NEGLIGENCE—METHODS OF WORK—LOADING LOGS—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence in adopting an unsafe method of work to make a question for the jury, where it appears that a train of logs was moved forward by attaching the loading chain to a log attached to the bunker of the car, and that this pulled up the bunker and load, causing loose logs on top of the load to roll down upon the plaintiff, who had been ordered by the foreman to go under the car to block a wheel.

SAME—PLEADING. Such negligence is sufficiently charged in a complaint alleging that the defendant ordered the car moved forward, and adopted a careless and negligent manner of doing so, detailing the condition of the car and the manner of moving it; especially on motion for a nonsuit.

SAME—CONTRIBUTORY NEGLIGENCE—RELIANCE ON ORDERS. An employee engaged in loading cars does not assume the risks and is not guilty of contributory negligence in obeying a specific command of the foreman to go under a car to block the wheels, when the same was moved forward in a negligent manner by a cable attached to a log, which tipped the load onto him; since the dangers were not so open and apparent that no man of ordinary prudence would have obeyed the specific order given.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 25, 1910, granting a nonsuit, in an action for personal injuries sustained by an employee engaged in loading logs. Reversed.

Heber McHugh and *John T. Casey*, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

¹Reported in 111 Pac. 882.

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Opinion Per RUDKIN, C. J.

RUDKIN, C. J.—This was an action to recover damages for personal injuries. At the close of the plaintiff's testimony, the court directed a judgment of nonsuit, from which this appeal is prosecuted.

The facts disclosed by the appellant's testimony are substantially as follows: At the time of receiving the injury complained of, the appellant was in the employ of the respondent as a member of a loading crew, engaged in loading logs from a landing onto the cars. The crew consisted of an engineer, a fireman, the foreman, the appellant and a fellow workman of the appellant. The logging cars consisted of two sets of trucks, with bunkers extending across between the wheels, upon which the logs were placed. The logs were loaded by means of a wire cable, extending from the engine through a block on a spar tree, and thence through a second block suspended on a guy wire immediately above the car to be loaded. A single tier of logs was first placed on the bunkers and bound down by chains, and the remainder of the load was placed on top of these, without any binding to hold the top logs in place.

The crew had loaded the bunker tier of logs and chained them down, and had placed two or three loose logs on top, when it became necessary to move the car forward about thirty feet to take up and load a large log which had been landed at that place. For the purpose of moving the car forward, the foreman and the fellow workman of the appellant attached the loading cable to one of the bunker logs which extended beyond the others. The foreman then directed the appellant to loosen the brakes on the car and block the wheel on the rail, as soon as the car was pulled forward to the desired point. After the brakes were loosened, the foreman signalled the engineer to go ahead, and when the car reached its destination, a second signal was given to hold the car hard or fast until the wheels were blocked. The appellant went under the side of the car to block the wheel, and while there the strain on the cable, which was evidently pulling upwards, raised the log

to which the cable was attached from the bunkers; and with it, the binding chains, thus causing one of the loose logs on top of the load to roll from the car, resulting in the injury complained of.

The work of loading the car was under the immediate supervision of the foreman, and it was his duty to so conduct the loading operations that no injury would befall the men under him, in so far as this could be done by the exercise of reasonable care. The nonsuit seems to have been directed on the theory that the negligence charged in the complaint was that,

"The defendant carelessly and negligently gave a signal to the engineer of said engine to go ahead quickly; that, in obedience to said signal, said engineer started the engine ahead quickly, whereby the log to which said cable was fastened was caused to move suddenly and with great force against the said chain, and caused the same to be lifted upwards against the said logs lying on the top of said chain and negligently and carelessly threw one of said logs off said car, and caused the same to roll from said car and down and upon said plaintiff, whereby he received the injuries hereinafter complained of and described;"

that this particular ground of negligence was not sustained by the testimony, and that, if any other negligence was shown, it was not within the allegations of the complaint.

If the court below was correct in its construction of the pleadings, its conclusion might logically follow; for it cannot be said that any single act committed or directed by the respondent through its foreman was negligent in itself, when disassociated from all other facts in the case. The method employed in loading the logs onto the cars, by placing loose logs on top of the tier chained to the bunkers, was usual and customary, and was not in itself negligent. The act of pulling the car forward by means of the loading cable was also usual and customary, and was not necessarily or inherently dangerous. The act of signalling the engineer to go ahead and to hold the car fast until the wheels were blocked was

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usual and necessary, and the act of directing the appellant to block the wheel was free from negligence, if the place was reasonably safe.

But we cannot consider these several acts separately and without reference to others. The method of loading might be reasonably safe for one purpose, but not for another; pulling the car forward by means of the loading cable might be safe under some circumstances, and exceedingly hazardous under other circumstances; and so with the signalling and the blocking of the wheels. And we think the jury might well find from the testimony in this case that the method employed by the respondent in pulling the car forward and blocking the wheels was not reasonably safe, under the circumstances disclosed by the record. The cable attached to the log pulled upward; and if the strain on the cable became sufficient, the log to which the cable was attached would unavoidably be raised from the bunkers, and if the log was raised, the binding chains would necessarily raise with it, and this would naturally, if not necessarily, cause the loose logs on top to roll from the car.

We think, also, that such negligence is sufficiently charged in the complaint, especially where the objection is first presented on a motion for a nonsuit. The complaint alleged in its third paragraph, "that said defendant ordered said car moved forward to said log and adopted a careless and negligent manner of moving said truck forward, in this," Here follows a detailed statement of the condition of the car, and the manner in which it was pulled forward.

Nor do we think that the appellant assumed the risk or was guilty of contributory negligence as a matter of law. He was acting under the immediate supervision of the foreman at all times, and it was the primary duty of the latter to look after his personal safety. While the appellant observed, in a general way, the manner in which the work was done, it cannot be said, as a matter of law, that he was cognizant of, and fully appreciated, the dangers of the situation, especially

dangers arising from the negligence of his employer. The appellant was acting at the time of his injury in obedience to a specific command of the master, and would not be guilty of contributory negligence unless the dangers of the situation were so open and apparent that no man of ordinary prudence would have obeyed the master's command. *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900, and cases cited. No such case is here presented.

The judgment is therefore reversed, and the cause is remanded for a new trial.

FULLERTON, GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9025. Department One. December 1, 1910.]

LEWIS CONSTRUCTION COMPANY, *Appellant*, v. KING COUNTY
et al., Respondents.¹

TAXES—PERSONAL PROPERTY—LIEN ON PROPERTY—TITLE—DISTRAINT. Under Rem. & Bal. Code, § 9235, providing that taxes assessed upon personal property shall be a lien thereon, regardless of transfers made, a vendee under a conditional sale, whereby the title to personal property remained in the vendor, cannot maintain an action to restrain the distraint of the property for personal property taxes, since it is immaterial who holds the title thereto, or to whom it was assessed.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 21, 1910, dismissing an action to restrain a levy to pay a tax on personal property, upon sustaining a demurrer to the complaint. Affirmed.

Leander T. Turner and *Sanford C. Rose*, for appellant.

George F. Vanderveer and *S. H. Chase*, for respondents.

¹Reported in 111 Pac. 892.

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MOUNT, J.—The lower court sustained a general demurrer to the complaint in this case. The plaintiff elected to stand upon the allegations of the complaint, and the action was dismissed. This appeal followed.

The only question in the case, as stated by the appellant, is whether the purchaser of personal property, upon an installment contract providing that title shall not pass until final payment has been made, shall be chargeable with personal property taxes levied upon such property when final payment has not been made. We think a more accurate statement of the question is, whether such property is liable for taxes levied thereon. The question arises under these facts, as alleged in the complaint: In April, 1907, the appellant purchased four motors from the Westinghouse Electric & Manufacturing Company, for a stipulated price to be paid in installments. The contract provided, among other things, the following:

“(4) The property in and title to the apparatus and the right to use the same under the patents of the company, shall not pass from the company until all payments hereunder (including deferred payments and payments of notes and renewals thereof, if any) shall have been fully made in cash, and the apparatus herein specified shall remain the personal property of the company, whatever may be the mode of its attachment to the realty or other property, until fully paid for in cash, and the purchaser agrees to perform all acts which may be necessary to perfect and assure retention of title to the said apparatus of the company. If default is made in any of the payments in the manner and form and at the time herein specified the company may retain any and all partial payments which have been made, as liquidated damages, and shall be entitled to the immediate possession of said apparatus and shall be free to enter the premises where such apparatus may be located and remove the same as its property, without prejudice to any further damages which the company may suffer by reason of the purchaser's refusal or failure to surrender the apparatus when so required. (A re-sale of the apparatus herein specified or any part thereof or installation of the same, by the purchaser, as agent or contractor for another, shall not alter the effect and intent of the foregoing provisions, it

being understood that the company's rights may be enforced against the purchaser's vendee or principal the same as they might have been enforced against the purchaser if such re-sale or installation had not been made.)"

The word "company," as used in the foregoing quotation, refers to the Westinghouse Electric & Manufacturing Company, and the word "purchasers," therein used, refers to the appellant in this case. The motors were delivered to the appellant in January, 1908, and were then installed, and have been in the possession, control, and use of appellant ever since that time. Final payment was not due and was not made upon the contract until October 8, 1908. In the year 1908, the county assessor of King county requested C. S. Wiley, the manager of appellant, to prepare a list of assessable property of the appellant for assessment for that year. A verified list was prepared, which list did not include the motors above referred to. The assessor was informed of the contract between appellant and the Westinghouse Electric & Manufacturing Company, and also that final payment for the motors had not been made to that company. The county assessor thereupon assessed the motors to appellant. The total amount of the taxes levied against the appellant for all its property was the sum of \$537.40, which amount included \$87.23 on account of the motors. On March 2, 1909, the appellant tendered to the county treasurer of King county \$450.17, in full payment of its taxes, and refused to pay the sum of \$87.23 levied as taxes on account of the motors. The amount tendered included the penalty, interest, and costs against all the personal property of the appellant except the motors. The county treasurer refused to receive the tender in full payment of all taxes due, and threatened to distrain the motors and other personal property of the appellant to satisfy the taxes levied. This action was brought to restrain such threatened levy. The tender as above stated was paid into court.

Appellant makes two contentions, as follows: That a tax

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on personal property is a charge against the person and not against the *res*, and that the owner of personal property against whom the tax is charged is the person in whom the legal title rests at the time the assessment is made. As bearing upon the first contention, the statute provides, at § 9235, Rem. & Bal. Code:

“The taxes assessed upon personal property shall be a lien upon all the real and personal property of the person assessed, from and after the date upon which such assessment is made, and no sale or transfer of either real or personal property shall in any way affect the lien for such taxes upon such property.”

It is clear from this section that such tax is a charge against the property assessed from and after the assessment. It is not claimed that the property in question was not subject to assessment, or was wrongfully assessed, or assessed to any other person than the appellant, or that the taxes had been paid. It follows that the property, being taxable, is liable for the taxes levied against it. It is immaterial to the state whether the title to the property is actually in the appellant or some other person. The collecting officer is authorized to pursue the property for the tax. It is true that it is alleged that the officer is threatening to seize this and other property, but it is not shown or claimed, as we understand, that this property is insufficient to pay the taxes and costs levied against it, or that other property is about to be seized to pay taxes levied upon this particular property. The contention of appellant amounts to this: that taxes which should have been collected from the Westinghouse Electric & Manufacturing Company are being enforced against appellant. But a complete answer to this is that the tax here sought is being enforced against the property assessed, which the statute, as we have seen, provides may be done.

Our conclusion upon this question makes it unnecessary to determine or discuss the question whether the assessment should have been made against the possessor or against the

owner of the legal title of the motors. We are of the opinion, therefore, that the complaint failed to state a cause for restraining the sale of the motors, and the judgment of the lower court must be affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and PARKER, JJ., concur.

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- cially where written evidence conflicts with oral testimony resting on memory, as there is a trial *de novo* on appeal. *Pacific Lumber and Timber Co. v. Dailey*..... 566
25. APPEAL—REVIEW—HARMLESS ERROR—TRIAL—COMMENT ON EVIDENCE. A suggestion by the trial judge to change the form of a hypothetical question to harmonize with uncontradicted evidence then admitted is not prejudicial error as comment on the evidence, where the jury was cautioned to disregard any statement of the court and any mistake made was promptly corrected. *Swanson v. Pacific Shipping Co.*..... 87
26. APPEAL—REVIEW—HARMLESS ERROR. Error in excluding evidence is immaterial, where it appears from the offer of proof that the evidence would have been insufficient to change the determination of the court. *McKivor v. Savage*..... 135
27. APPEAL—HARMLESS ERROR—PARTIES AFFECTED. Error in ruling as to which one of the plaintiffs was the owner of a lien sought to be foreclosed cannot be assigned upon an appeal by the defendants. *Biggs v. Hoffman*..... 495
28. APPEAL—REVIEW—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS CURED BY VERDICT. The failure of a jury to follow, in making a special finding, an erroneous instruction of the court is not prejudicial error, where the record upon the whole case shows that the verdict was right, and no other verdict could have been rendered on proper instructions. *Thornton v. Dow*..... 622
29. APPEAL—DECISION—LAW OF CASE. Upon a second appeal, the decision on the former appeal becomes the law of the case. *Butler v. Supreme Court of The Independent Order of Forresters*..... 171
Fransoli v. Tacoma..... 463

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

30. APPEAL—DECISION—REMAND. Upon reversing an order granting a new trial on one specified ground, without passing upon other grounds, the case will be remanded with directions to pass upon the other grounds of the motion. *Thornton v. Dow*..... 622

APPEARANCE:

Necessity for to confer jurisdiction to enter summary judgment against sureties on bond for release of vessel, see ACTION, 4.
 Of foreign corporation, see CORPORATIONS, 1.
 As defeating right to default, see JUDGMENT, 7, 8.

1. APPEARANCE—WHAT CONSTITUTES—STIPULATIONS. A stipulation by defendants allowing the amendment of the complaint is a general appearance. *Robertson Mortgage Co. v. Thomas*..... 514

APPLIANCES:

Liability of employer for defects, see MASTER AND SERVANT, 1-5.

APPLICATION:

Time for to vacate judgment, see JUDGMENT, 5.

APPROVAL:

Of construction of public works by engineer, see MUNICIPAL CORPORATIONS, 1.

ARCHITECTS:

Approval or certificate of architect, arbitrators, or others of performance of contract, see CONTRACTS.

ARGUMENT OF COUNSEL:

In civil actions, see TRIAL, 2.

ASSAULT:

Reversal of conviction and remand for included lesser crime, see CRIMINAL LAW, 4.

Lesser offense included in charge, see INDICTMENT AND INFORMATION.

ASSAULT AND BATTERY:

1. ASSAULT AND BATTERY—DEADLY WEAPON—EVIDENCE—SUFFICIENCY. The evidence is insufficient to sustain a conviction for "assault with a hammer," where the prosecuting witness had the hammer when he was knocked down and stunned by the first blow, none of the witnesses for the state could testify that he was struck by the hammer, one testifying that he was knocked down by a blow with the fist, and defendant's testimony that he struck with his fist was corroborated by the circumstances. *State v. Lillie*..... 200

ASSESSMENT:

Acceptance of as reinstating member of benefit society, see INSURANCE, 9.

Refund of special assessment left in treasury, see MUNICIPAL CORPORATIONS, 8.

Of tax, see TAXATION, 1-4, 8.

ASSIGNMENT:

Agreement to pay contingent fee as assignment of claim, see ATTORNEY AND CLIENT, 1.

Of lease without acknowledgment, see FRAUDS, STATUTE OF, 1.

Of lease, see LANDLORD AND TENANT, 1-4.

ASSOCIATIONS:

Mutual benefit insurance associations, see INSURANCE, 9-11.

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 10-14.

ATTACHMENT:

Of property in hands of *bona fide* mortgagee, see **CHATTEL MORTGAGES**.

ATTORNEY AND CLIENT:

Liability for attorney's fees under guaranty for advances to corporation, see **GUARANTY**, 3.

Appearance for client by service of demurrer, see **JUDGMENT**, 7.

Argument or conduct of counsel at trial in civil actions, see **TRIAL**, 2.

1. **ATTORNEY AND CLIENT—CONTINGENT FEES—ASSIGNMENT OF CLAIM.** An agreement to pay attorneys a contingent fee for the prosecution of a claim does not act as an assignment of a part of the claim, which is necessary to create an interest in a future recovery. *Plummer v. Great Northern R. Co.*..... 214
2. **ATTORNEY AND CLIENT—FEES—LIEN—STATUTES.** An action pending in some court in this state is necessary to secure to an attorney a lien under Rem. & Bal. Code, § 136, subd. 3, giving an attorney a lien for his compensation upon money in the hands of the adverse party in an action or proceeding in which the attorney is employed. *Plummer v. Great Northern R. Co.*..... 214
3. **ATTORNEY AND CLIENT—FEES—RIGHT OF ATTORNEY—FOREIGN STATUTE.** An attorney prosecuting an action for personal injuries in the courts of British Columbia under the workmen's compensation act, which precludes the attorney from taking any part of the recovery as a fee except such as is awarded by the arbitrator, cannot, after accepting the arbitrator's award, claim any other interest in, or lien upon, the recovery. *Plummer v. Great Northern R. Co.*..... 214

AUTHORITY:

Of adjuster to waive proofs of loss, see **INSURANCE**, 6.

Service of demurrer by attorney as conferring jurisdiction, see **JUDGMENT**, 7.

Unlawful cutting or carrying off timber, see **TRESPASS**.

AUTOMOBILES:

Destruction of machine stalled on crossing, see **RAILROADS**, 2-4.

AWARD:

Of contract for public improvements, see **MUNICIPAL CORPORATIONS**, 4.

BAIL:

Indemnity for, see **INDEMNITY**.

BALLOTS:

See **ELECTIONS**.

BANKS AND BANKING:

1. **BANKS AND BANKING—CRIMES—INSOLVENCY—RECEIVING DEPOSITS—STATUTES—CONSTRUCTION.** As a criminal law will not be extended beyond its plain terms, the act of 1893, entitled an act punishing bank officers for receiving deposits knowing the bank to be insolvent, and providing that officers of any "banking institution" so doing shall be guilty of a felony, did not apply to private bankers, but only to incorporated banks; especially in view of the subsequent legislative construction in 1907 (Rem. & Bal. Code, § 3331), extending the law to cover "owners" and in 1909 (*Id.*, § 2640), to cover stockholders and employees. *State v. Youngbluth*..... 383

BAR:

- Of action by former adjudication, see **JUDGMENT**, 10-15.
- Of action by limitation, see **LIMITATION OF ACTIONS**.
- Removal of bar to action for refund of special assessment excess, see **MUNICIPAL CORPORATIONS**, 8.

BATTERY:

- See **ASSAULT AND BATTERY**.

BENEFICIAL ASSOCIATIONS:

- Mutual benefit insurance association, see **INSURANCE**, 9-11.

BEQUESTS:

- In general, see **WILLS**.

BIDS:

- Letting contract without competitive bids, see **BRIDGES**.
- Contracts with municipality, see **MUNICIPAL CORPORATIONS**, 3, 4.

BILLS AND NOTES:

- Joinder of parties in action on, see **ACTION**, 1.
- Guaranty of payment of note, see **GUARANTY**.
- Complaint in action on notes, see **PLEADING**, 1.

BONDS:

- Right to enter judgment against non-appearing sureties on bond releasing vessel, in foreclosure action, see **ACTION**, 4.
- On appeal, see **APPEAL AND ERROR**, 9-10.
- Superseding appeal from review of orders of railroad commission, see **CARRIERS**, 3.
- Action on guardian's bond and right of offset for support of ward, see **GUARDIAN AND WARD**, 2.
- To indemnify bail, see **INDEMNITY**.
- Contractor's bond, failure to require, see **MUNICIPAL CORPORATIONS**, 5-7.

BONDS—CONTINUED.

1. **BONDS—SUFFICIENCY—STATUTES—WANT OF SURETY.** Rem. & Bal. Code, § 777, providing that no bond shall be void for want of form or substance, etc., has no application where the bond has no surety upon it at all. *Wenatchee Orchard & Irrigation Co. v. Thompson* 643

BOOKS OF ACCOUNT:

Parol evidence of items recorded in, see **EVIDENCE**, 8.

BOOM COMPANY:

See **LOGS AND LOGGING**.

Condemnation by, see **EMINENT DOMAIN**, 2.

BONA FIDE PURCHASER:

Of lands, see **VENDOR AND PURCHASER**, 5-7.

BOUNDARIES:

Mistake and possession to boundaries as adverse, see **ADVERSE POSSESSION**.

1. **BOUNDARIES—LOST CORNERS—EVIDENCE TO ESTABLISH—SUFFICIENCY—SURVEYS—FIELD NOTES.** A survey to locate a lost corner on the west meander line of a section, by reference to the witness trees called for in the field notes, from which point other corners, noted in the field notes as marked by a pile of stones, are located on the meander line approximately at high tide mark, takes precedence over and overcomes a survey of the south line of the section by courses and distances, whereby the west meander line of the section is established further west, and twenty-five rods below ordinary high tide in 18 feet of water at high tide, where a meander line could not have been run. *Ouellette v. Olympia Jim*..... 562

BREACH:

Of contract, see **CONTRACTS**.

Of conditions in policy, see **INSURANCE**, 2, 4.

Of agreement by assignee of lease, see **LANDLORD AND TENANT**, 3, 4.

Of trust in paying over funds of labor association, see **TRADE UNIONS**.

Waiver of defaults of vendee, see **VENDOR AND PURCHASER**, 4, 8.

BRIDGES:

Letting contract for county bridge, see **COUNTIES**.

1. **BRIDGES—PROCEEDINGS—NAVIGABLE STREAMS—STATUTES—REPEAL.** Rem. & Bal. Code, § 5680, providing for publishing notice and preliminary steps to declare a public necessity, etc., before letting contracts for county bridges across navigable streams, was not superseded by the act of 1893 (Rem. & Bal. Code, § 5575), a general act, not complete in itself, relating to county road and bridge work, and containing no specific provisions relating to contracts for bridge

BRIDGES—CONTINUED.

construction across navigable streams; nor was it superseded by the act of 1903 (Rem. & Bal. Code, § 5585), relating to the letting of contracts where the estimated cost exceeds \$150, since the latter is merely supplemental to and not conflicting with the earlier act, which relates chiefly to steps preliminary to the letting. *Green v. Okanogan County* 309

2. SAME—EFFECT OF FEDERAL ACT. The operation of Rem. & Bal. Code, § 5680, providing for publishing notice and preliminary steps to declare a public necessity, etc., before letting contracts for county bridges across navigable streams, is not affected by the subsequent Federal acts providing that navigable streams shall not be bridged except by consent of Congress and upon executive approval of the plans, as this but imposes an additional burden upon the county. *Green v. Okanogan County*..... 309

3. SAME—CONTRACTS—ADVERTISING FOR BIDS—EMERGENCY—STATUTES—CONSTRUCTION. No emergency exists excusing the county commissioners from letting a bridge contract without competitive bids, within the contemplation of Rem. & Bal. Code, § 5585, in the case of new construction and where all the former means for crossing the river remained intact, and there was no sudden increased demand rendering existing facilities inadequate for the short time (three weeks) necessary for advertising for bids. *Green v. Okanogan County* 309

BUILDINGS:

Building contracts, see **CONTRACTS**.

Accidents from dangerous or defective construction or condition, see **NEGLIGENCE**, 1-3.

Insufficient balcony rail as nuisance, see **NUISANCES**, 2.

BURDEN OF PROOF:

To show waiver of mechanics' lien, see **MECHANICS' LIENS**, 3.

To overcome presumption of negligence, see **NEGLIGENCE**, 5.

Proving contributory negligence, see **STREET RAILROADS**, 12.

To prove predecessor as *bona fide* purchaser, see **VENDOR AND PURCHASER**, 5.

BY-LAWS:

Of benefit society, see **INSURANCE**, 10.

CANCELLATION OF INSTRUMENTS:

See **REFORMATION OF INSTRUMENTS**.

Removal of clouds from title, see **QUIETING TITLE**.

Rescission of contract of sale of land, see **VENDOR AND PURCHASER**, 1, 2, 9.

CANCELLATION OF INSTRUMENTS—CONTINUED.

1. CANCELLATION OF INSTRUMENTS — DEEDS — MUTUAL MISTAKE—ESTOPPEL. Where a father, after conveying a life estate, deeded the reversion in consideration of an agreement that the grantees should care for and educate his three infant children until they became eighteen years of age, and the grantees failed to care for the children, but allowed the life tenants to perform the consideration and treat the land as their own for sixteen years, and then agreed to and participated in a different testamentary disposition of the property by the life tenants, they cannot claim a mutual mistake and want of consideration in agreeing to such testamentary disposition because of representations by the life tenants to the effect that the first deed conveying a life estate was lost and that the life tenants had since acquired the fee simple title. *Simmons v. Macomber* 469
2. CANCELLATION OF INSTRUMENTS—ACTIONS—DISMISSAL—EFFECT—QUIETING TITLE. The dismissal, on the merits, of an action to cancel a deed has the effect of quieting the title of the defendants. *Simmons v. Macomber*..... 469

CANDIDATES:

- Appearance of names on election ballot, see ELECTIONS, 1-4.
 Compelling placing of names of on ballot, see MANDAMUS, 1.
 Contesting nomination of, see STATES.

CARRIERS:

1. CARRIERS — NEGLIGENCE — SETTING DOWN PASSENGERS—EVIDENCE—SUFFICIENCY. The negligence of a street railway company in starting a car while a woman sixty-five years old was alighting at a regular stopping place, is for the jury, where it appears that the conductor knew that she wanted to get off at that place, that he left the car to deliver a mail sack, and on returning quickly, gave the signal to start the car, without noticing that the passengers were getting off. *Breeden v. Seattle, Renton & Southern R. Co.*..... 522
2. CARRIERS—ACTIONS—ISSUES AND PROOF—IMMATERIAL VARIANCE. In an action for injuries sustained by a passenger in alighting from a street car, a variance as to the name of the street where the accident occurred is not material where no one was misled and no objection was made to the evidence. *Breeden v. Seattle, Renton & Southern R. Co.* 522
3. CARRIERS—REGULATIONS—RATES—RAILROAD COMMISSION — REVIEW—APPEAL—SUPERSEDEAS BOND—STATUTES. Rem. & Bal. Code, § 8629, providing for appeals from orders of the superior court reviewing orders of the railroad commission reducing railroad rates, which the superior court in its discretion might "suspend" pending the hearing, and which requires that bonds "shall" be required in addition to the usual appeal bond, is mandatory and contemplates a com-

CARRIERS—CONTINUED.

pensatory bond to supersede the judgment pending the appeal to the supreme court; especially in view of the provision allowing appeal "as in other civil cases," and Rem. & Bal. Code, § 1722, providing for a stay in all cases. *State ex rel. Puget Sound Electric R. v. Mitchell* 660

CAUSAL CONNECTION:

Between spectator injured in building and contractor rendering latter liable as for creation of nuisance, see **NUISANCES**, 3.

CERTAINTY:

Of contract as affecting right to specific performance, see **SPECIFIC PERFORMANCE**, 1.

CERTIFICATE:

Of architects of performance of contract, see **CONTRACTS**.

Certification of candidates' names to auditor, see **MANDAMUS**, 1.

Of city engineer approving construction of public works, see **MUNICIPAL CORPORATIONS**, 1.

Enjoining issuance of certificates on contracts for filling tide lands, see **PUBLIC LANDS**, 2.

CERTIORARI:

1. **CERTIORARI—REVIEW—CESSATION OF CONTROVERSY.** A writ of certiorari to review an order suspending a temporary injunction will be quashed where the suspension was to permit the institution of a condemnation suit, which was dismissed pending the hearing; since the suspension has become inoperative, and the relator can apply to the lower court for relief. *State ex rel. Sylvester v. Superior Court* 583

CESSATION OF CONTROVERSY:

On appeal, see **APPEAL AND ERROR**, 3-5.

As ground for quashing writ of certiorari, see **CERTIORARI**.

CHARGE:

To jury in civil actions, see **TRIAL**, 4.

CHATTEL MORTGAGES:

1. **CHATTEL MORTGAGES—VALIDITY—RIGHTS OF SUBSEQUENT CREDITORS.** A subsequent creditor of a mortgagor cannot assert the invalidity of a chattel mortgage for want of acknowledgment and affidavit of good faith, where he had acquired no lien until the mortgagee had obtained possession and title in discharge of the debt; and any interest of a third person could not help such a creditor. *Urquhart v. Coss* 249

CHATTEL MORTGAGES—CONTINUED.

2. **SAME—PRIORITIES—MORTGAGEE IN POSSESSION—ATTACHMENT BY SUBSEQUENT CREDITORS.** The transfer of the possession and title of mortgaged chattels to a *bona fide* mortgagee, in satisfaction of the debt, is valid as against an attachment by a subsequent creditor, without regard to the validity of the mortgage. *Urquhart v. Coss* 249

CHILD:

See **ADOPTION; GUARDIAN AND WARD; INFANTS.**

CITATION:

See **PROCESS.**

On appeal, see **APPEAL AND ERROR, 11, 12.**

CITIES:

See **MUNICIPAL CORPORATIONS.**

CIVIL RIGHTS:

Deprivation of life, liberty, or property without due process of law, see **CONSTITUTIONAL LAW, 1, 3-5.**

CLAIMS:

Agreement for contingent fee as assignment of claim, see **ATTORNEY AND CLIENT, 1.**

Against estate of decedent, see **EXECUTORS AND ADMINISTRATORS.**

CLASS LEGISLATION:

See **CONSTITUTIONAL LAW, 1.**

COLLATERAL ISSUE:

Proof of by parol, see **EVIDENCE, 7.**

COLLISION:

Between street cars or with vehicles, see **STREET RAILROADS, 7, 8.**

COMMENCEMENT OF ACTION:

What constitutes, see **ACTION, 2, 3.**

COMMENT:

On evidence by judge in instructions to jury, see **TRIAL, 4.**

COMMERCE:

Carriage of goods and passengers, see **CARRIERS.**

COMMISSIONERS:

- Letting contract for bridge, see COUNTIES.
- Enjoining land commissioner from issuing certificates on contracts for filling tide lands, see PUBLIC LANDS, 2.
- Orders and proceedings of railroad commission, see RAILROADS, 5-14.

COMMON CARRIERS:

- See CARRIERS.

COMMUNITY PROPERTY:

- Descent of, on death of infant, see DESCENT AND DISTRIBUTION.
- In general, see HUSBAND AND WIFE, 1, 2.
- Homestead as, see PUBLIC LANDS, 1.

COMPENSATION:

- Of attorney, see ATTORNEY AND CLIENT.
- Pecuniary compensation for injuries caused by unlawful acts of another, see DAMAGES.

COMPETENCY:

- Of answer as admission, see EVIDENCE, 3.
- Of fellow employees, see MASTER AND SERVANT, 7-9.
- Of witnesses in general, see WITNESSES.

COMPLAINT:

- In civil action, see PLEADING, 1.

COMPROMISE AND SETTLEMENT:

- Payment of account stated, see EXECUTORS AND ADMINISTRATORS.
- Binding effect of voluntary settlement pending litigation, see STIPULATIONS.

CONCLUSIVENESS:

- Findings of jury in equity case, see EQUITY.
 - Of judgment, see JUDGMENT, 10-15.
 - Of engineer's estimates, see MUNICIPAL CORPORATIONS, 1.
1. COMPROMISE AND SETTLEMENT—FRAUDULENT CONCEALMENT. An agreement settling the rights of the parties in and to all the stock of a corporation does not include an interest which one of the parties had fraudulently concealed from the other party to his prejudice without fault or negligence on the part of the latter. *Miner v. Paulson* 150

CONDEMNATION:

- Taking property for public use, see EMINENT DOMAIN.

CONDITIONS:

- Precedent to action by contractor for balance due, see **CONTRACTS**.
- Precedent to right of foreign corporation to sue, see **CORPORATIONS**, 3.
- Precedent to condemnation of use of city street by railroad, see **EMINENT DOMAIN**, 3-5.
- Effect of conditions on back of policy, see **INSURANCE**, 1.
- Precedent to action by vendee for breach of contract, see **VENDOR AND PURCHASER**, 8.

CONSENT:

- Of owner as defense to action for trespass on realty, see **TRESPASS**.

CONSIDERATION:

- For indemnity contract, see **INDEMNITY**.
- For promise to waive defaults of vendee, see **VENDOR AND PURCHASER**, 4.

CONSTITUTIONAL LAW:

- Elimination of intent in defining crime as exercise of police power, see **CRIMINAL LAW**, 3.
 - Regulation of vote by ballot, see **ELECTIONS**, 1-4.
 - Right to trial by jury, see **JURY**.
 - Removal of bar in action against city, see **LIMITATION OF ACTIONS**.
 - Right to assert invalidity of law as defense, see **REFORMATION OF INSTRUMENTS**, 2.
 - Effect of partial invalidity of statute, see **STATUTES**.
 - Ordinance relating to fares and transfers as impairing obligation of contract, see **STREET RAILROADS**, 2.
1. **CONSTITUTIONAL LAW—CLASS LEGISLATION—HOTELS—INSPECTION—CLASSIFICATION.** Rem. & Bal. Code, §§ 6030-6049, providing for the inspection of inns, hotels, and public lodging houses having ten or more rooms does not provide an unreasonable classification and does not violate the constitutional prohibitions against class legislation, the deprivation of property without due process of law, the delegation of legislative powers, or the invasion of private rights. *State v. McFarland* 98
 2. **CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—HOTELS—PAYMENT OF INSPECTION FEE.** Rem. & Bal. Code, § 6046, making it a misdemeanor, punishable by fine or imprisonment, for a hotel keeper to refuse to pay the annual fee for hotel inspection, violates Const., art. 1, § 17, forbidding imprisonment for debt. *State v. McFarland* 98
 3. **CONSTITUTIONAL LAW—DUE PROCESS—CRIMINAL LAW—RIGHT TO JURY TRIAL.** The "due process clause" of the constitution taken in connection with art. 1, § 21, providing that the right to trial by jury shall remain inviolate, means that there can be no due process depriving one of life or liberty upon a criminal charge without a trial

CONSTITUTIONAL LAW—CONTINUED.

- by jury as the right existed in the territory at the time of the adoption of the constitution, upon all questions of fact, and this includes the substantive fact of the sanity of the accused at the time of the act charged; hence Rem. & Bal. Code § 2259, providing that insanity shall be no defense to crime, and that no evidence thereof shall be admitted, is void. *State v. Strasburg*..... 106
4. CONSTITUTIONAL LAW—DUE PROCESS—LAW OF THE LAND. By “due process” and “the law of the land,” is meant that life, liberty and property are to be held under the protection of the general rules that govern society. *State v. Strasburg*..... 106
5. SAME—DUE PROCESS—INSANE PERSONS—TRIAL OF ISSUE—NOTICE—PROCEEDINGS. Rem. & Bal. Code, § 2283, is lacking in every essential requirement of due process of law, in that it provides that a person charged with crime and insane at the time of the act charged, may, in the discretion of the court, without any charge of insanity, notice or trial, or opportunity to be heard in his defense, upon the court’s own observation, or upon evidence *de hors* the record, upon any procedure adopted by the court, be committed to a hospital and deprived of his liberty. *State v. Strasburg*..... 106

CONSTRUCTION:

- Of statute providing for survival of action upon death of party, see ABATEMENT AND REVIVAL.
- Statutes relating to receipt of deposits by insolvent bank, see BANKS AND BANKING.
- Of statute providing for letting of contract for bridge in emergency, see BRIDGES, 3.
- Of statutes relating to criminal insane, see CRIMINAL LAW, 2.
- Of statute providing for action by heirs of deceased, see DEATH, 2.
- Of written guaranty, see GUARANTY, 1, 3.
- Of statute providing for conviction of lesser degree assault included in charge, see INDICTMENT AND INFORMATION.
- Statutes regulating sale of liquor, see INTOXICATING LIQUORS, 1.
- Contract assigning lease, see LANDLORD AND TENANT, 1.
- Of statute requiring city to take bond from contractor on public work, see MUNICIPAL CORPORATIONS, 7.
- Of contract providing for estimates as to proper measurement of material used in street work, see MUNICIPAL CORPORATIONS, 2.
- Of ordinance relating to fares and transfers, see STREET RAILROADS, 3.
- Of findings, see TRIAL, 7.
- Of deed, see WILLS.

CONSTRUCTIVE TRUSTS:

- See TRUSTS, 2.

CONTEST:

- Of election, see ELECTIONS, 5, 6.

CONTINGENT FEES:

See ATTORNEY AND CLIENT, 1.

CONTRACTORS:

Bonds of on public work, see MUNICIPAL CORPORATIONS, 5-7.

Liability of contractor for insufficiency in balcony railing, see NEGLIGENCE, 1-3.

Liability for insufficient balcony rail as nuisance, see NEGLIGENCE, 3; NUISANCE, 3.

CONTRACTS:

Execution of pending appeal as effecting cessation of controversy, see APPEAL AND ERROR, 4.

Between attorney and client, see ATTORNEY AND CLIENT.

For county bridge, see BRIDGES.

Compromise, see COMPROMISE AND SETTLEMENT.

Subscription to corporate stock, see CORPORATIONS, 7, 8.

Of counties, see COUNTIES.

Admission of parol or extrinsic evidence, see EVIDENCE, 6, 7.

Agreements within statute of frauds, see FRAUDS, STATUTE OF.

Of husband or wife, see HUSBAND AND WIFE, 1-3.

Of indemnity, see INDEMNITY.

Of insurance in general, see INSURANCE.

Assignment of lease, see LANDLORD AND TENANT, 1-4.

Municipal contracts, see MUNICIPAL CORPORATIONS, 1-7.

For filling tide lands, see PUBLIC LANDS, 2.

Specific performance, see SPECIFIC PERFORMANCE.

Stipulation in actions, see STIPULATIONS.

Extent of ordinance enacted pursuant to peace contract relating to fares and transfers, see STREET RAILROADS, 1-3.

Discretion of trustees under trust agreement, see TRUSTS, 3.

Sale of land, see VENDOR AND PURCHASER.

Implied obligations to pay for services rendered, see WORK AND LABOR.

1. CONTRACTS—BUILDING CONTRACTS—ARCHITECT'S FINAL CERTIFICATE—CHANGE IN BUILDING—ACTIONS—CONDITION PRECEDENT. The certificate of an architect to the final completion of a building is not a condition precedent to an action by the contractor for a balance due him, as stipulated in the original contract for its construction, where the parties later agreed to add a basement and a third story, increasing the cost one-half, without any reference to the first contract or without making the architect the arbiter of the final completion of the building as changed; since such stipulations will not be extended beyond the express terms of the contract; and the contractor's request for a final certificate did not make the same essential. *Sweatt v. Bonne*..... 18

CONTRIBUTION:

1. CONTRIBUTION—PAYMENT OF JUDGMENT FOR LIEN—MECHANICS' LIENS. In consolidated actions to foreclose mechanics' liens, the owner, upon payment of a judgment in favor of a materialman, may enforce contribution from the contractor who was ultimately liable therefor. *Sweeney v. Archibald*..... 595

CONTRIBUTORY NEGLIGENCE:

- Of plaintiff in action for destruction of automobile at railroad crossing, see NEGLIGENCE, 4.
- Pleading defense, see PLEADING, 2.
- Of driver of automobile stalled on crossing, see RAILROADS, 4.
- Of person injured by street car, see STREET RAILROADS, 8-10, 12.
- Taking case from jury on ground of, see TRIAL, 3.

CONVERSION:

- Of corporate funds by officer, see CORPORATIONS, 6.

CONVEYANCES:

- Of personalty as security for debt, see CHATTEL MORTGAGES.
- In general, see DEEDS.
- By husband or wife, see HUSBAND AND WIFE, 1, 2.
- As security for debt, see MORTGAGES.
- Right of one partner to deed partnership real estate, see PARTNERSHIP.
- In trust, see TRUSTS.

CORPORATIONS:

- Presumption of personal service of process on foreign corporation, see APPEAL AND ERROR, 20.
- Fraudulent concealment of stock as affecting compromise agreement, see COMPROMISE AND SETTLEMENT.
- Evidence of damages for misrepresenting solvency of, see EVIDENCE, 5.
- Fraud in representing solvency of, see FRAUD.
- Regulations by gas company as to installation of meters, see GAS.
- Guaranty of advances to corporation, see GUARANTY.
- Municipalities, see MUNICIPAL CORPORATIONS.
- 1. CORPORATIONS — ACTIONS — APPEARANCE — COURTS — JURISDICTION. Where a foreign corporation by special appearance tendered a plea to the jurisdiction raising an issue of fact as to whether it was doing business in this state, the appearance was sufficiently general to give the court jurisdiction to determine the issue of fact. *Lively v. Husebye* 47
- 2. CORPORATIONS—STOCK—ACTIONS—COURTS—JURISDICTION — SPECIFIC PERFORMANCE. The courts of this state have jurisdiction of the subject-matter of an action brought by nonresidents to compel a foreign corporation to issue stock to the plaintiffs, where the president and

CORPORATIONS—CONTINUED.

secretary and the individual stockholder improperly in possession of the stock were residents of the state, the company had a branch office and was doing business in the state and where, in case of inability to enforce the decree, a money judgment for the value of the stock could be entered against the defendants. *Lively v. Husebye*..... 47

3. CORPORATIONS—ACTIONS—LIST OF OFFICERS—FAILURE TO FILE—EFFECT. Failure to comply with Rem. & Bal. Code, §§ 3691, 3692, requiring a corporation to file a list of its officers with the county auditor, does not prevent the corporation from moving to set aside a judgment secured on service upon one who was not an officer of the corporation. *Lushington v. Seattle Auto and Driving Club*..... 546
4. CORPORATIONS—TORTS—OFFICERS—LIABILITY. Where the president and general manager of a corporation directs a trespass to be committed, both are jointly and severally liable for the torts of the latter. *Lytle Logging & Mercantile Co. v. Humptulips Driving Co.*..... 559
5. CORPORATIONS—PROMOTERS—FRAUD. A promoter of a corporation who sought to make exorbitant profit, at the expense of investing stockholders, by the sale to the corporation of land held under option without any actual investment, cannot recover from the corporation on the ground of fraud because the corporation refused to perform the contract and after forfeiture of the option bought the land direct at a low figure; since promoters owe the utmost good faith to stockholders and are accountable for secret profits. *Man-gold v. Adrian Irrigation Co.*..... 286
6. CORPORATIONS—RECEIVERS—GROUNDS—FRAUD OF PROMOTER—STOCK-HOLDERS. A receiver is properly appointed for a corporation where it appears that a promoter, through fraudulent representations, obtained a drug business and property of the other stockholders of the value of \$33,000, and conveyed the same to the corporation in full payment of stock of the par value of \$100,000, two-thirds of which he issued to himself without paying anything therefor, and in violation of his agreement to sell the same for the benefit of the corporation, by means of which he absolutely controls the corporation, and secured heavy profits to himself for which he refuses to account, and that he is about to bond the company, and threatens the corporation with insolvency by ill management. *Kennedy Drug Co. v. Keyes* 337
7. CORPORATIONS—SALE OF STOCK—FRAUD—EVIDENCE—SUFFICIENCY—DEEDS—EXCHANGE OF PROPERTY. A sale of stock in a foreign mercantile company and a deed given in exchange is properly rescinded for fraud, where the vendors represented that it was solvent, doing a prosperous business, and that they had sold shares to their son at \$8 per share, the statements being false and implicitly relied upon by the vendees. *Rock v. Joseph*..... 531

CORPORATIONS—CONTINUED.

8. **SAME—RESCISSION—TIME—LACHES.** A delay of three months, after hearing of false representations, in bringing suit to rescind a sale of corporate stock and cancel a deed, will not preclude a recovery, where the delay was at the request of the plaintiff's son, connected with the corporation, and for the reason that it was being pressed by creditors. *Rock v. Joseph* 531

CORROBORATION:

Of prosecutrix in prosecution for rape, see **RAPE**.

COSTS:

Liability of guarantors for attorney's fees, see **GUARANTY**, 3.

1. **COSTS—ACCOUNTING.** In an action in the nature of an interpleader, but in fact for an accounting, in which the amount was in dispute, costs may be awarded against the plaintiffs instead of against the amount paid into court by plaintiffs, where the court found a greater sum to be due from the plaintiffs. *Braeger v. Bolster & Barnes*. 579
2. **COSTS—ON APPEAL—MANDAMUS—RELIEF—DISMISSAL.** On appeal from a judgment denying a writ of mandamus to compel a gas company to install separate meters, the appellant cannot, in order to avoid costs, have a writ to compel the installation of one general meter, where that service was tendered the appellant and rejected at the trial below. *State ex rel. Hallett v. Seattle Lighting Co.* 81

CO-TENANCY:

See **TENANCY IN COMMON**.

COUNSEL:

See **ATTORNEY AND CLIENT**.

COUNTIES:

Performance of contract for construction of bridge as cessation of controversy, see **APPEAL AND ERROR**, 4.

Letting contract for bridge, see **BRIDGES**.

Refund of unearned portion of liquor license, see **INTOXICATING LIQUORS**, 1, 2.

1. **COUNTIES—COMMISSIONERS—CONTRACTS.** County commissioners in letting a bridge contract must strictly comply with the law, or it is not binding and money paid thereon can be recovered. *Green v. Okanogan County* 309
2. **COUNTIES—CONTRACTS—ACCEPTANCE OF BENEFITS UNDER ILLEGAL CONTRACT—RECOVERY.** Where a county has accepted and is using a county bridge, constructed under a contract let without complying with the law, but which the county could have entered into if it had conformed to the statutory requirements, it is liable for its reasonable value, and can only recover any excess wrongfully paid out. *Green v. Okanogan County* 309

COUNTIES—CONTINUED.

3. COUNTIES—CONTRACTS—BRIDGE DONATIONS—RECOVERY. Money donated to a county to induce the construction of a county bridge belongs to the county, and may be recovered by the county if it has been wrongfully paid out under an unauthorized contract. *Green v. Okanogan County* 309

COURTS:

- Review of decisions, see APPEAL AND ERROR.
 Review of failure to consolidate actions as dependent on objection in lower court, see APPEAL AND ERROR, 8.
 Supersedeas by supreme court, see APPEAL AND ERROR, 13.
 Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 29.
 Appointment of receiver for corporation, see CORPORATIONS, 6.
 Jurisdiction in suit against foreign corporation, see CORPORATIONS, 1, 2.
 Jurisdiction over criminal prosecution, see CRIMINAL LAW, 5, 6.
 Election contests, see ELECTIONS, 5, 6.
 Condemnation proceedings, see EMINENT DOMAIN.
 Conclusiveness of judgments, see JUDGMENT, 10-15.
 Right to trial by jury, see JURY.
 Justices' courts, see JUSTICES OF THE PEACE.
 Controlling discretionary action of boom company in locating boom site, see LOGS AND LOGGING, 1.
 Trial by court without jury, see TRIAL, 6.
 Province of court and jury, see TRIAL, 3.
 Control of discretion of trustees under trust agreement, see TRUSTS, 3.

CRIMINAL LAW:

- See ASSAULT AND BATTERY; LARCENY; RAPE.
 Receiving deposit after insolvency, see BANKS AND BANKING.
 Deprivation of life or liberty without due process of law, see CONSTITUTIONAL LAW, 1, 3-5.
 Constitutional guaranties of personal liberty and security, see CONSTITUTIONAL LAW, 2.
 Bonds to indemnify bail, see INDEMNITY.
 Conviction of offense included in that charged, see INDICTMENT AND INFORMATION.
 Insane criminals, see INSANE PERSONS.
 Jurisdiction of justices of peace, see JUSTICES OF THE PEACE.
 Competency of husband and wife to testify in criminal prosecution, see WITNESSES.
 1. CRIMINAL LAW—INTENT—INSANITY. The power of the legislature to eliminate the element of intent in defining crime cannot be exercised to the extent of preventing an accused from invoking the defense of insanity at the time the act was committed and excluding evidence thereof. *State v. Strasburg*..... 106

CRIMINAL LAW—CONTINUED.

2. CRIMINAL LAW—INSANITY—RESPONSIBILITY—PROCEDURE—TRIAL—STATUTES—CONSTRUCTION. Construing together Rem. & Bal. Code, § 2259, providing that insanity is no defense to crime, and § 2283, providing that whenever, in the judgment of the court trying the same, any person convicted of a crime shall have been at the time of its commission, unable, by reason of insanity to comprehend the nature of the act, the court may direct such person to be confined in a state hospital for treatment, and providing for the determination of the question of sanity by the court, it will be held, in order to sustain the constitutionality of the act, that the legislature did not intend to punish an insane person for crime, but only intended to change the method for determining the issue of insanity. *State v. Strasburg* 106
3. CRIMINAL LAW—INTENT—POLICE POWER—INSANE PERSONS. While, under the police power, the legislature has a broad discretion in eliminating the element of intent in defining crime, a penal law fixing criminal responsibility upon the insane exceeds constitutional restraints; since a penal law is invalid where it punishes a man for an act which the utmost care and circumspection on his part would not enable him to avoid. *State v. Strasburg* 106
4. CRIMINAL LAW—APPEAL—DECISION—REMAND—INDICTMENT—OFFENSES INCLUDED IN CHARGE. Upon reversal of a conviction for assault with a deadly weapon, for insufficiency of the evidence as to the higher offense, the evidence establishing assault only, the case will be remanded for sentence for simple assault, as that is embraced within the offense charged. *State v. Lillie*..... 200
5. CRIMINAL LAW—APPEAL—JURISDICTION. Jurisdiction of a criminal appeal cannot be conferred on the supreme court by agreement, where the statute confers no jurisdiction. *State v. Wright*..... 277
6. CRIMINAL LAW—APPEAL—BY STATE—RIGHT TO APPEAL. The state cannot appeal from a judgment in a criminal case directing an acquittal on the ground of the insufficiency of the evidence, under Rem. & Bal. Code, § 1716, subd. 7, limiting appeals by the state to cases wherein the indictment or information is set aside or found insufficient or the error does not affect the merits. *State v. Wright* 277
7. SAME—"PUNISHMENT." The theory that "punishment" for crime is not within the present-day humanitarian conception of the proper treatment of criminals, and is contrary to the spirit of modern law, cannot uphold a statute authorizing the restraint of the criminal insane, where the act provides that such person be "punished" by imprisonment. *State v. Strasburg* 106

CROSSINGS:

Accidents at railroad crossings, see RAILROADS, 2-4.

CUSTODY:

Of abandoned child, see **INFANTS**.

Change in custody as recall of deeds, see **WILLS**, 2.

DAMAGES:

For wrongful death, see **DEATH**, 3.

Evidence of in representing solvency of corporation, see **EVIDENCE**, 5.

For fraud, see **FRAUD**, 8.

Liability of assignee of lease for breach, see **LANDLORD AND TENANT**, 4.

For trespass, see **TRESPASS**.

Action at law for breach of contract, see **VENDOR AND PURCHASER**, 8.

1. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$2,750 is not excessive, where a shingle weaver, 24 years of age, lost two fingers and sustained an injury to his thumb, impairing his earning capacity to the extent of at least fifty cents a day, and suffered much pain and inconvenience. *Easterly v. Eatonville Lumber Co.* 647
2. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$1,700 for injuries sustained by a woman sixty-five years of age, thrown to the ground by the starting of a street car, is not excessive, where it appears that she was injured internally and severely bruised on the head and hip, resulting in a slight paralysis, and had not fully recovered in eight months. *Breeden v. Seattle, Renton & Southern R. Co.* 522
3. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$6,552.62, for the fracture of the skull and serious permanent injury to an able-bodied young man in the vigor of youth is not excessive. *Denny v. Seattle, Renton & Southern R. Co.*..... 426
4. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$17,500 for personal injuries sustained by a ship carpenter 42 years of age earning \$100 a month, from which injuries he afterwards died, is excessive and should be reduced to \$10,000, the plaintiff's widow not being entitled in that action to any damages by reason of the death. *Swanson v. Pacific Shipping Co.* 87
5. **DAMAGES—INSTRUCTIONS—MAXIMUM.** In an action for damages, it is not error to give an instruction stating the maximum amount to which the plaintiffs would be entitled under the pleadings. *Hull v. Seattle, Renton & Southern R. Co.*..... 162

DANGEROUS MACHINERY AND APPLIANCES:

See **MASTER AND SERVANT**, 1-5.

DEATH:

Of party as ground for abatement of action, see ABATEMENT AND REVIVAL.

Review of failure to consolidate actions for as dependent on objection in lower court, see APPEAL AND ERROR, 8.

Caused by electricity, see ELECTRICITY.

Proof of death of insured, see INSURANCE, 7, 8.

Of child on street car track, see STREET RAILROADS, 4-6, 9-12.

1. DEATH—ACTIONS—PERSONS ENTITLED TO SUE—DEPENDENCY—STATUTES—EVIDENCE—SUFFICIENCY. Rem. & Bal. Code, § 194, authorizing an action for wrongful death of a child by parents dependent upon him for support, requires a substantial degree of dependency arising from a necessitous want, and a recognition of the necessity on the part of the child; and the evidence is insufficient where it shows only occasional contributions in the nature of gifts to parents who supported themselves. *Bortle v. Northern Pac. R. Co.* 552
2. DEATH—RIGHT OF ACTION—STATUTES—CONSTRUCTION. Under Bal. Code, § 4828, providing that the heirs or personal representatives may maintain an action for the death of persons caused by the wrongful act or neglect of another, separate actions cannot be maintained by a widow and a child of the deceased. *Riggs v. Northern Pac. R. Co.* 292
3. DEATH—DAMAGES—EXCESSIVE VERDICT. A verdict for \$2,564, for the value of the services of a boy six years old, killed by a street car, is not excessive, where the father was blind and in the business of selling notions, and intended to use the boy when of proper age to lead him about. *Tecker v. Seattle, Renton & Southern R. Co.* ... 570

DEBT:

Imprisonment for, see CONSTITUTIONAL LAW, 2.

DECEDENTS:

Estates, see DESCENT AND DISTRIBUTION.

DECISION:

On appeal, see APPEAL AND ERROR, 29, 30.

Remand for lesser degree sentence after reversal on appeal, see CRIMINAL LAW, 4.

Former decisions as controlling, see JUDGMENT, 10-15.

DECLARATIONS:

As evidence in civil actions, see EVIDENCE, 3, 4.

Of agent as evidence of relation, see PRINCIPAL AND AGENT.

Of trust, see TRUSTS, 1.

DEEDS:

Cancellation, see CANCELLATION OF INSTRUMENTS.

Absolute deed as mortgage, see MORTGAGES, 1, 2.

By one partner of firm real estate, see PARTNERSHIP.

DEEDS—CONTINUED.

Conveyance of easement to railway as affecting preference right to purchase shore lands, see **PUBLIC LANDS**, 4.

To show title of plaintiff, see **QUIETING TITLE**.

Reformation, see **REFORMATION OF INSTRUMENTS**.

As notice to subsequent purchasers, see **VENDOR AND PURCHASER**, 6, 7.

Testamentary disposition of property, see **WILLS**.

1. **DEEDS—DELIVERY.** The delivery of the last mentioned deed in favor of the grandchildren to the grandparents, at whose request it was made, is in effect a delivery to the grandchildren. *Simmons v. Macomber* 469
2. **DEEDS—GRANTS—EASEMENTS—RIGHT OF WAY.** A right of way deed releasing and forever quitclaiming a strip for railway purposes, to revert to the grantors if ceased to be used for such purposes, grants an easement only, although some language in the granting and habendum clause is appropriate to convey the fee. *Pacific Iron Works v. Bryant Lumber & Shingle Mill Co.* 502

DEFAULT:

For failure to produce writing on demand, see **EVIDENCE**, 9.

Vacation of judgment, see **JUDGMENT**, 1-5.

Process sufficient to confer jurisdiction to enter default judgment, see **PROCESS**.

In title defeating contract of sale of land, see **VENDOR AND PURCHASER**, 2, 3.

DEGREES:

Of assault and conviction of lesser offense included in charge, see **INDICTMENT AND INFORMATION**.

DELIVERY:

Of deed, see **DEEDS**, 1.

Of insurance policy without pre-payment of premium, see **INSURANCE**, 3.

Delivery or mailing to owner of duplicate statement of material furnished, see **MECHANICS' LIENS**, 1.

DEMAND:

To produce writing, see **EVIDENCE**, 9.

To mortgagee for premium before right of forfeiture, see **INSURANCE**, 3.

DENIALS:

In pleading, see **PLEADING**, 2, 3.

DEPENDENCY:

Entitling parents to sue for wrongful death, see **DEATH**, 1.

DEPOSITIONS:

1. **DEPOSITIONS — RIGHT TO USE — PLEADINGS — AMENDMENTS—WITNESSES—CROSS-EXAMINATION.** A deposition taken on behalf of defendant before his answer was amended is admissible in evidence, where the facts alleged in the amended answer are substantially the same; since, under the code, amendments are almost a matter of course at any stage of the proceedings, and cross-examination is not confined strictly to the issues. *Miner v. Paulson* 150

DESCENT AND DISTRIBUTION:

Survival of action by ancestor, see **ABATEMENT AND REVIVAL**.
 Persons entitled to sue for wrongful death, see **DEATH**, 1, 2.
 Joinder of heirs in action for wrongful death, see **DEATH**, 2.
 Administration of estates of decedents, see **EXECUTORS AND ADMINISTRATORS**.

1. **DESCENT AND DISTRIBUTION—HUSBAND AND WIFE—COMMUNITY PROPERTY.** Upon the death of a wife, one-half of the community property descends to the children, who become tenants in common with their father. *Eckert v. Schmitt* 23
2. **DESCENT AND DISTRIBUTION—MINORS INHERITANCE FROM PARENT.** Upon the death of a minor, intestate and without issue, estate inherited from his mother descends to his sisters, under Rem. & Bal. Code, § 1341, subd. 6. *Eckert v. Schmitt*. 23

DISCHARGE:

From liability as insurer, see **INSURANCE**, 3, 4, 10.

DISCRETION:

Location of site by boom company, see **LOGS AND LOGGING**, 1.
 Of city in letting contract to "best bidder," see **MUNICIPAL CORPORATIONS**, 4.
 Of city to declare emergency and dispense with bids for public work, see **MUNICIPAL CORPORATIONS**, 3.
 Of trustees under trust agreement, see **TRUSTS**, 3.

DISCRETION OF COURT:

Adoption proceedings, see **ADOPTION**.
 In opening default judgment, see **JUDGMENT**, 3, 7.
 To require special verdict, see **TRIAL**, 5.
 Control of argument of counsel, see **TRIAL**, 2.

DISCRIMINATION:

Special privileges or immunities and class legislation, see **CONSTITUTIONAL LAW**, 1.

DISMISSAL AND NONSUIT:

Dismissal of appeal on ground of cessation of controversy, see **APPEAL AND ERROR**, 3-5, 9-11.

DISMISSAL AND NONSUIT—CONTINUED.

Dismissal of action to cancel deed as quieting title, see **CANCELLATION OF INSTRUMENTS**, 2.

Dismissal of suit as ground for quashing writ of review, see **CERTIORARI**.

Judgment of nonsuit as bar, see **JUDGMENT**, 15.

Judgment of dismissal as *res adjudicata*, see **JUDGMENT**, 10, 11.

Dismissal of judgment after vacation for want of jurisdiction of person, see **JUDGMENT**, 9.

At trial, see **TRIAL**, 2, 3.

DISTRESS:

For taxes, see **TAXATION**, 8.

DISTRIBUTION:

Of estate of decedent, see **DESCENT AND DISTRIBUTION**.

DIVORCE:

Estoppel of wife by decree from claiming title to property, see **ESTOPPEL**, 1.

Separate maintenance, see **HUSBAND AND WIFE**, 4-6.

1. **DIVORCE—JUDGMENT—VACATION—LACHES.** An action to vacate a decree of divorce upon the ground of perjury of the plaintiff must fail for lack of diligence, where the defendant knew of the perjury at the time of the trial and did not commence the action for nearly four years, claiming that he had but recently discovered the evidence to prove the perjury. *Eckert v. Schmitt* 23

DONATIONS:

To county to induce construction of bridge and ownership thereof, see **COUNTIES**, 3.

DRUGGISTS:

Sale of intoxicating liquor, see **INTOXICATING LIQUORS**, 1.

DUE PROCESS OF LAW:

See **CONSTITUTIONAL LAW**, 1, 3-5.

Removal of bar of statute by retroactive law as violation of due process clause, see **LIMITATION OF ACTIONS**.

DUES:

Forfeiture of insurance policy for nonpayment, see **INSURANCE**, 10.

EASEMENTS:

Grant of right of way as easement, see **DEEDS**, 2.

Conveyance of as affecting right to purchase shore lands, see **PUBLIC LANDS**, 4.

EJECTMENT:

1. **EJECTMENT—PLEADING—ISSUES AND PROOF.** In an action to recover a certain tract of land under a deed intended as a mortgage, it is error to determine the title to another tract upon which a similar mortgage deed was given at the same time, when there was nothing in the issues as to such tract, and the evidence received thereon was material upon the question of intent as to the tract mentioned in the complaint. *Boyer v. Paine* 56
2. **EJECTMENT—RELIEF—JUDGMENT—FORECLOSURE OF MORTGAGE—ISSUES AND PROOF.** In an action to recover land under a deed to plaintiffs, which the court found to be intended only as a mortgage, in which action the defendant merely asks that it be adjudged to be the owner subject to the mortgage, it is outside of the issues and error to decree a foreclosure of the mortgage; notwithstanding that evidence was received without objection upon the question whether the mortgage had been satisfied. *Boyer v. Paine* 56

ELECTIONS:

Mandamus to compel placing names of candidates on ballot, see **MANDAMUS**, 1.

To treat mortgage debt as due on default, see **MORTGAGES**, 6.

Contesting nomination of candidates for legislature, see **STATES**.

1. **ELECTIONS—RIGHT TO VOTE—NATURE.** While the right to vote is a constitutional right, under Const., art. 6, § 6, providing that all elections shall be by ballot, and that the legislature shall provide a method of voting by secret ballot, it is subject to regulation by the legislature in any reasonable way not prohibited. *State ex rel. Shepard v. Superior Court* 370
2. **ELECTIONS—RIGHT TO VOTE—REGULATIONS—BALLOTS—REASONABLENESS.** Rem. & Bal. Code, § 4893, subd. 6, providing that no candidate's name shall appear on the ballot more than once, and that the candidate, if nominated by two or more parties, may designate the party under whose title he desires to appear, is a reasonable regulation of the elective franchise, and violates no constitutional right of the voter to vote for a candidate of his choice. *State ex rel. Shepard v. Superior Court* 370
3. **ELECTIONS—BALLOTS—STATUTES—IMPLIED REPEAL.** Rem. & Bal. Code, § 4893, subd. 6, providing that the names of candidates shall not appear on the ballot more than once, was not impliedly repealed by the amendment of 1909 (Id., § 4842), providing that the names of judges nominated at a joint convention of several parties shall appear on the tickets of all the parties holding the joint convention; since there is no such conflict between the two acts as to indicate any such legislative intent. *State ex rel. Shepard v. Superior Court* 370
4. **ELECTIONS—POLITICAL PARTIES—RIGHTS.** Political parties not being protected by the constitution, they have no constitutional right

ELECTIONS—CONTINUED.

to have their full tickets printed upon a ballot, and a law is not unconstitutional because it tends to destroy political parties. *State ex rel. Shepard v. Superior Court* 370

5. ELECTIONS—CONTESTS—CITATIONS—TIME FOR—JURISDICTION. Where a primary election contest was filed within five days as required by Rem. & Bal. Code, § 4829, the statute prescribing no time for service of citation, the court has jurisdiction, after quashing a citation, to issue another citation. *State ex rel. McAvoy v. Gilliam* 420
6. ELECTIONS—CONTESTS—PROCEDURE—STATUTES. Rem. & Bal. Code, § 4829, authorizes any candidate for nomination at a primary election to contest the nomination of any other candidate for the same office, and provides a tribunal to try the question; and the fixing of the specific procedure is not essential to the validity of the statute, in view of Rem. & Bal. Code, § 69, providing that, when jurisdiction is conferred upon any tribunal, all the means to carry it into effect are also given, and if the proceedings be not specifically fixed, any suitable mode may be adopted. *State ex rel. McAvoy v. Gilliam* 420

ELECTRICITY:

Burden of proof to overcome presumption of negligence, see NEGLIGENCE, 5.

1. ELECTRICITY—DEGREE OF CARE—PRESUMPTIONS—RES IPSA LOQUITUR—MUNICIPAL CORPORATIONS. A city furnishing electric light for residential uses owes the highest degree of skill, care, and diligence, and a presumption of negligence arises, on the principle of *res ipsa loquitur*, where a private consumer, turning on an electric light in the ordinary manner, is electrocuted by reason of a defective ground for the secondary wire, which had come in contact with a primary wire in a high wind. *Abrams v. Seattle* 356
2. ELECTRICITY—DEGREE OF CARE—INSTRUCTIONS—MUNICIPAL CORPORATIONS. In an action for wrongful death from electric shock caused by a defective ground in a secondary wire of a city lighting system, it is not prejudicial error to instruct the jury that every reasonable effort must be made to adopt and use all proper means readily obtainable and known to science, taken in connection with other proper instructions on the subject. *Abrams v. Seattle*... 356
3. ELECTRICITY—NEGLIGENCE—EVIDENCE—SUFFICIENCY—MUNICIPAL CORPORATIONS. The negligence of the city is for the jury, where a *prima facie* case was made by the fact that its electric lighting system electrocuted a private consumer while turning on a light in his residence, and there was evidence of a defective ground of the secondary wire, which became crossed with a primary wire, that such condition had existed several hours without giving notice of its condition, and that the system was not in proper order or not supplied with modern appliances. *Abrams v. Seattle* 356

EMERGENCY:

Existence of excusing letting of contract for county bridge without competitive bids therefor, see **BRIDGES**, 3.

Discretion of city to declare emergency and dispense with bids for public work, see **MUNICIPAL CORPORATIONS**, 3.

EMINENT DOMAIN:

Necessity for appropriation of shore rights for use in driving logs, see **NAVIGABLE WATERS**.

Contract for sale of land as estopping owner in condemnation proceedings, see **STIPULATIONS**.

Instructions as comment on evidence, see **TRIAL**, 4.

1. **EMINENT DOMAIN—PROPERTY SUBJECT—HARBOR AREA—PREFERENCE RIGHT TO LEASE.** The preference right of abutters to lease the harbor area lying in front of tide and uplands is property or an interest in land or a "contract right relating thereto, including any leasehold interest therein," which is subject to condemnation for a railroad right of way. *State ex rel. Wilson v. Grays Harbor & Puget Sound R. Co.* 32
2. **EMINENT DOMAIN—BY BOOM COMPANY—INTERESTS OF STOCKHOLDERS.** The interest of the stockholders of a boom company in a lumber company and a connecting railway, inviting monopolistic control of the industry by them, is no objection to condemnation proceedings by the boom company; since the companies are public service corporations bound to give reasonable service and are amenable to control by the public authorities. *State ex rel. United Tanners Timber Co. v. Superior Court* 193
3. **EMINENT DOMAIN—USE OF CITY STREETS—FRANCHISE—CONDITION PRECEDENT.** A railroad company cannot condemn an abutter's interest in a city street in which it seeks to lay its railway tracks without first obtaining a franchise from the city giving it the right to the use of the streets. *State ex rel. Sylvester v. Superior Court.* 279
4. **SAME—RIGHTS OF ABUTTERS.** An abutter upon a street, whose interests are being condemned by a railroad company seeking to use the street for railroad purposes, after its franchise therefor has been forfeited by the city council, has such an interest in abating the public nuisance in the street as to entitle it to raise the point in the condemnation proceeding that the company has no franchise to use the street. *State ex rel. Sylvester v. Superior Court.* 279
5. **EMINENT DOMAIN—RAILROADS—RIGHTS IN STREETS—INJUNCTION TO PROTECT TRESPASS.** A court of equity will not protect a railroad company in the use of a public street, pending condemnation proceedings, where the company had no franchise and was a trespasser in the street *ab initio*. *State ex rel. Sylvester v. Superior Court.* 583

EMPLOYEES:

See **MASTER AND SERVANT**.

EQUALIZATION:

Of taxes, see **TAXATION**, 3, 4.

EQUITY:

See **CANCELLATION OF INSTRUMENTS**; **INJUNCTION**; **SPECIFIC PERFORMANCE**; **TRUSTS**.

Nature of suit for accounting, see **ACCOUNT**.

Review of findings on appeal in equity, see **APPEAL AND ERROR**, 24.

Vacation of divorce decree, see **DIVORCE**.

Protecting trespass in city street pending condemnation, see **EMINENT DOMAIN**, 5.

Relief against judgment, see **JUDGMENT**, 1-5, 7-9, 14.

Enjoining issuance of certificates on contracts for filling tide lands, see **PUBLIC LANDS**, 2.

Suit to quiet title, see **QUIETING TITLE**.

Defense to suit to reform instruments, see **REFORMATION OF INSTRUMENTS**.

Necessity for findings in equity case, see **TRIAL**, 6.

1. **EQUITY—ADVISORY VERDICT—CONCLUSIVENESS—INCONSISTENCY.** Upon the submission of questions to a jury in an equitable case, the verdict is advisory only, and inconsistency between special findings and the general verdict is immaterial. *Leitch v. Young* 446

ESTABLISHMENT:

Of boundaries, see **BOUNDARIES**.

Of trusts, see **TRUSTS**, 2.

ESTATES:

Created by deed, see **DEEDS**, 2.

Decedents' estates, see **DESCENT AND DISTRIBUTION**; **EXECUTORS AND ADMINISTRATORS**.

Tenancy in common, see **TENANCY IN COMMON**.

ESTOPPEL:

Right to raise question for first time on appeal, see **APPEAL AND ERROR**, 6-8, 10.

To allege error in civil actions or proceedings, see **APPEAL AND ERROR**, 16-18, 27.

To take appeal, see **APPEAL AND ERROR**, 3-5.

To claim mutual mistake in action to cancel deed, see **CANCELLATION OF INSTRUMENTS**, 1.

Of gas company to enforce rules, see **GAS**.

To deny validity of mortgage on community property, see **HUSBAND AND WIFE**, 2.

Of benefit society by acceptance of dues, see **INSURANCE**, 9.

By judgment, see **JUDGMENT**, 10-15.

Meeting claim of estoppel to dispute judgment by counter affidavits, see **JUDGMENT**, 3.

ESTOPPEL—CONTINUED.

Of grantees in action to reform deed, see **REFORMATION OF INSTRUMENTS**, 1, 2.

By contract of sale from denying necessity for public use, see **STIPULATIONS**.

1. **ESTOPPEL—PLEADING AND JUDGMENT—DIVORCE—EFFECT OF DECREE.** Where, in an action for a divorce by a second wife, she alleges and the court finds that the husband owned an undivided one-half interest in a homestead, the other half of which descended as community property to the children of his first wife, and that the husband had caused a mortgage thereon to be foreclosed and had entered into a contract to purchase the equity of redemption in fraud of the children and of plaintiff's rights, a decree of divorce awarding to the wife all of the husband's interests in the property was intended to transfer his half interest only, and estops the wife from claiming the entire title, against the claims of the children. *Eckert v. Schmitt* 23
2. **ESTOPPEL—PLEADING.** An estoppel must be pleaded. *Olson v. Springer* 77

EVIDENCE:

In suit on accounting, see **ACCOUNT**.

Review of rulings as dependent on presentation of objection or exception in lower court, see **APPEAL AND ERROR**, 6, 7.

Review of rulings as dependent on presentation by record, see **APPEAL AND ERROR**, 14.

Review of ruling as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 25, 26.

For assault, see **ASSAULT AND BATTERY**.

To establish boundaries, see **BOUNDARIES**.

For injuries to passenger, see **CARRIERS**, 1.

Fraud in sale of corporate stock, see **CORPORATIONS**, 7.

Dependency entitling parents to sue for wrongful death, see **DEATH**, 1.

Depositions, see **DEPOSITIONS**.

In ejectment, see **EJECTMENT**.

Negligence of city in causing wrongful death, see **ELECTRICITY**, 3.

Payment of account stated, see **EXECUTORS AND ADMINISTRATORS**.

In action for fraud, see **FRAUD**, 3-6.

Solvency of corporation, see **FRAUD**, 4-6.

In action for injuries caused by runaway team, see **HIGHWAYS**, 2.

Of abandonment and nonsupport of wife, see **HUSBAND AND WIFE**, 4, 5.

On contracts of indemnity, see **INDEMNITY**, 4.

On insurance policies, see **INSURANCE**, 7.

Proof of service to confer jurisdiction over person, see **JUDGMENT**, 7.

On application to open default, see **JUDGMENT**, 3, 4.

In prosecution for larceny, see **LARCENY**.

Relation of independent contractor, see **MASTER AND SERVANT**, 24-26.

EVIDENCE—CONTINUED.

For injuries to servant in general, see MASTER AND SERVANT.
Competency or incompetency of fellow servant, see MASTER AND SERVANT, 7-9.

In action to foreclose mechanics' lien, see MECHANICS' LIENS.

Character of deed as mortgage, see MORTGAGES, 1, 2.

Bad faith of city engineer in making estimates, see MUNICIPAL CORPORATIONS, 1.

Newly discovered as ground for new trial, see NEW TRIAL, 2.

Verdict or findings contrary to evidence, see NEW TRIAL, 1.

Existence of relation, see PRINCIPAL AND AGENT.

Service of process, see PROCESS, 2.

In suit to quiet title, see QUIETING TITLE.

Corroboration of prosecutrix, see RAPE.

In suit for specific performance, see SPECIFIC PERFORMANCE, 2.

For injuries by street railroads to person on or near tracks, see STREET RAILROADS, 6-8.

In trespass, see TRESPASS.

Question of fact for jury, see TRIAL, 3.

Reception at trial, see TRIAL, 1.

To establish trust, see TRUSTS.

In action to rescind for fraud, see VENDOR AND PURCHASER, 9.

Competency, attendance, credibility and examination of witnesses, see WITNESSES.

In action for services, see WORK AND LABOR.

1. EVIDENCE—PERSONAL INJURIES—RES GESTAE—ADMISSIBILITY. In an action for personal injuries through the negligent acts of members of a ship's crew, a remark made by the captain of the vessel at the time to the effect that the crew would be killing some one next or had pretty near killed a man is admissible as part of the *res gestae*. *Swanson v. Pacific Shipping Co.* 87
2. EVIDENCE—RES GESTAE. Where a brakeman, who fell from the side of a car, stated when found that he fell by reason of a loose hand-hold, and the parties present walked down the track and examined the cars, their statements upon their return as to the hand-hold are not admissible as part of the *res gestae*. *Riggs v. Northern Pac. R. Co.* 292
3. EVIDENCE—ADMISSIONS—PLEADING STRUCK OUT. An answer stricken out on motion of a defendant is not competent as an admission to prove any of the facts stated therein, as the same is *functus officio*, and its admissions are not binding on the defendant. *Wiley v. Northern Pac. R. Co.* 597
4. EVIDENCE—TRIAL—ADMISSIBILITY. The admissions of a party against interest are admissible as substantive independent evidence on the opponent's case in chief. *Simons v. Cissna* 141
5. SAME—DAMAGES—EVIDENCE—SUFFICIENCY. Where, in an action for misrepresenting the solvency of a corporation, the plaintiff,

EVIDENCE—CONTINUED.

while unable to segregate all the items of damages resulting therefrom in the performance of a contract, is able to state the entire cost of all the work and what proportion of it was done under the contract, there is sufficient evidence to support a verdict for substantial damages, under an instruction that plaintiff could only recover for loss sustained on work under the contract. *Simons v. Cissna* 141

6. **EVIDENCE—PAROL EVIDENCE TO VARY WRITING—FRAUD.** Parol evidence is admissible to show that a written agreement for the sale of corporate stock did not express the true contract between the parties, where part of the shares were only assigned temporarily for voting purposes, in fraud of the rights of one of the owners, who was not notified and was thereby deprived of their use, although the purchaser intended no ultimate fraud and was willing to reassign the stock. *Miner v. Paulson* 150
7. **EVIDENCE—PAROL EVIDENCE—COLLATERAL ISSUE.** That the plaintiffs in an action were the joint owners of an automobile, by reason of a conditional contract of sale in writing, is a collateral issue only, which may be proved by parol. *Hull v. Seattle, Renton & Southern R. Co.* 162
8. **EVIDENCE—PAROL EVIDENCE—BOOK ACCOUNTS.** Parol evidence is admissible of the amounts received for the sale of chattels, although the amounts received were recorded in regular books of account. *Hull v. Seattle, Renton & Southern R. Co.* 162
9. **EVIDENCE—WRITING—DEMAND TO PRODUCE.** A demand to produce a writing, made of a witness on the stand, is not such as to put the parties to the action in default for failure to produce it. *Hull v. Seattle, Renton & Southern R. Co.* 162

EXCEPTIONS, BILL OF:

Presentation and reservation of grounds of review in record, see **APPEAL AND ERROR**, 14.

EXECUTION:

Of mortgage on community property, see **HUSBAND AND WIFE**, 1, 2.
Of indemnity bond, see **INDEMNITY**, 4.

EXECUTORS AND ADMINISTRATORS:

1. **EXECUTORS AND ADMINISTRATORS—CLAIMS—PAYMENT—EVIDENCE—SUFFICIENCY.** In an action to establish a claim against the estate of a deceased partner, there is sufficient evidence of payment of an account stated between the partners, where, on statement of the account, the deceased agreed to leave a check for the amount with an attorney, there was evidence that the parties shortly after met and discussed or passed a check, and the widow of the deceased testified that the plaintiff called on the deceased a few days later claiming he had not been paid sufficient money, when they went over their

EXECUTORS AND ADMINISTRATORS—CONTINUED.

books again and agreed that the previous settlement was correct; especially in view of a delay of two years and failure to commence suit during the lifetime of the deceased. *Zonig v. Boehme* 500

FACTORY ACT:

Guarding dangerous machinery, see **MASTER AND SERVANT**, 11.

FALSE REPRESENTATIONS:

See **FRAUD**.

FARES:

See **STREET RAILROADS**, 1-3.

FEEES:

Attorney, see **ATTORNEY AND CLIENT**.

FELLOW SERVANTS:

See **MASTER AND SERVANT**, 2, 7-9.

FENDERS:

Reasonableness of ordinance requiring equipment of street cars with, see **STREET RAILROADS**, 4, 5.

FILING:

Failure to file list of officers as affecting motion to vacate judgment, see **CORPORATIONS**, 3.

Notice of *lis pendens*, see **LIS PENDENS**.

Claim or statement of mechanic's lien, see **MECHANICS' LIENS**, 2.

FINDINGS:

Necessity for including in transcript, see **APPEAL AND ERROR**, 15.

Review on appeal or writ of error, see **APPEAL AND ERROR**, 23, 24.

Inconsistency between special findings and general verdict, see **EQUITY**.

Special findings by jury, see **TRIAL**, 5.

Necessity for in equity case, see **TRIAL**, 6.

Construction of findings in action at law, see **TRIAL**, 7.

FIRE INSURANCE:

See **INSURANCE**, 1-3, 5, 6.

FIXTURES:

1. **FIXTURES—SAWMILL MACHINERY—MORTGAGE OF REAL ESTATE.** The machinery in a sawmill and porch column plant consisting of stock goods that are portable and removable from the building without injury to the building, such as engines, lathes, shafting, pulleys, belts, saws, machines, and dry kiln apparatus, are not fixtures, and do not pass under a real estate mortgage; but a tubular boiler, set in masonry and inclosed in brick work which could not be removed without removing the brick work, is a fixture. *Zimmermann v. Bosse* 556

FORECLOSURE:

- Of maritime lien and right to enter judgment against nonappearing sureties on bond releasing vessel, see ACTION, 4.
- Payment of judgment by owner in mechanics' lien foreclosure and right of contribution, see CONTRIBUTION.
- Of mechanics' lien, see MECHANICS' LIENS.
- Of mortgage, see MORTGAGES.
- Purchase by cotenant from purchaser at foreclosure sale, see TENANCY IN COMMON, 1.

FOREIGN CORPORATIONS:

- See CORPORATIONS, 1, 2, 7, 8.

FOREIGN LAWS:

- As affecting lien of attorney for compensation, see ATTORNEY AND CLIENT, 3.

FORFEITURE:

- Of insurance, see INSURANCE, 3, 4, 10.

FORMER ADJUDICATION:

- See JUDGMENT, 10-15.

FRANCHISE:

- As condition precedent to condemnation of use of city street by railroad, see EMINENT DOMAIN, 3.
- Forfeiture of railroad franchise by city, see RAILROADS, 1.
- For street railway, see STREET RAILROADS, 1.

FRAUD:

- As affecting compromise agreement, see COMPROMISE AND SETTLEMENT.
 - Of promoter, see CORPORATIONS, 5, 6.
 - Subscription to corporate stock, see CORPORATIONS, 7, 8.
 - Parol evidence to vary contract for corporate stock, see EVIDENCE, 6.
 - Pleading fraud, see PLEADING, 1.
 - Constructive trusts arising from fraud, see TRUSTS, 2.
 - Of vendor avoiding contract of sale of land, see VENDOR AND PURCHASER, 1, 2, 9.
1. **FRAUD—MISREPRESENTATION—SOLVENCY—LIABILITY.** General misrepresentations as to the solvency of a corporation not confined to any specific work under a contract, renders the defendant liable to plaintiff for loss thereby sustained in the performance of the contract, including loss on work outside the contract which the parties thereto treated as being within the contract. *Simons v. Olesna*. 141
 2. **SAME—INSTRUCTIONS.** An instruction in an action for misrepresenting the solvency of a corporation, correctly stating the rule of liability, is not prejudicially erroneous by reason of the addition of

FRAUD—CONTINUED.

- the clause that a person making such representations cannot be heard to say that he was a person upon whom no reliance should have been placed. *Simons v. Cissna* 141
3. SAME. In an action for misrepresenting the solvency of a company, whether the statement of defendant that plaintiff "could not lose by contracting" with the company was a mere opinion and not actionable, depends upon the context and other representations made at the time respecting the solvency of that company; and it is therefore proper to refuse to instruct that it was a mere opinion or prediction. *Simons v. Cissna* 141
4. SAME—INSOLVENCY—EVIDENCE—ADMISSIBILITY. In an action for misrepresenting the solvency of a mill company, court proceedings begun against the company for the recovery of the land on which the mill was situated, afterwards settled by removal of the mill and surrender of the land, in which action the defendant represented the company, are admissible on the question of the solvency of the company, and defendant's knowledge and connection with its business affairs. *Simons v. Cissna* 141
5. SAME. Evidence that the husband of a stockholder in a corporation owns property is not admissible upon an issue as to the solvency of the stockholder. *Simons v. Cissna* 141
6. SAME—SOLVENCY—EVIDENCE—SUFFICIENCY. The evidence is sufficient to show the insolvency of a corporation, where but \$5,000 of its capital stock was paid in, all of which was used to make an initial payment on a real estate contract, and it had no title or property with which to meet its obligations. *Simons v. Cissna* 141
7. FRAUD—PLEADING. Fraud need not be alleged in direct terms, it being sufficient if the facts constituting the fraud are set forth. *Miner v. Paulson* 150
8. FRAUD—DAMAGES—SALES—REPRESENTATIONS. Damages for fraud in the sale of furniture and a monthly tenancy of a lodging house are recoverable where the sale was induced by false representations to the effect that the vendor had positive information that the landlord was in Alaska and the lease could be continued for two years, and the purchaser was, in about two months, compelled to vacate the location, which was the principal consideration for the sale. *Jankowsky v. Slade* 591

FRAUDS, STATUTE OF:

1. FRAUDS, STATUTE OF—ASSIGNMENT OF LEASE—ACKNOWLEDGMENT. An assignment of a lease is valid without acknowledgment under the laws of this state. *American Savings Bank & Trust Co. v. Mafridge* 180

FRAUDS, STATUTE OF—CONTINUED.

2. **FRAUDS, STATUTE OF—INTEREST IN LAND—SALE OF TIMBER.** An oral agreement abrogating a written contract for standing timber is void, as it involves an interest in land which must be in writing. *Thill v. Johnston* 393
3. **FRAUDS, STATUTE OF—INTEREST IN LAND—PART PERFORMANCE—PAYMENT.** Payment of the consideration of an oral contract for an interest in land is not such a part performance as to take the case out of the operation of the statute of frauds. *Thill v. Johnston*. 393

FRAUDULENT CONVEYANCES:

Complaint in action for, see **PLEADING**, 1.

FUNDS:

Wrongful application of funds of labor association, see **TRADE UNIONS**.

GAS:

1. **GAS—CORPORATIONS—RULES.** It is a reasonable regulation of a gas company to require that its customers owning apartment houses and desiring to install more than one meter shall provide a separate meter room on each floor or in the basement where all meters may be installed, where it appears that such an arrangement would be more sanitary, and there would be less danger of explosion in case of fire and less trouble and expense in making repairs and collections. *State ex rel. Hallett v. Seattle Lighting Co.* 81
2. **GAS—CORPORATIONS—RULES—WAIVER.** The waiver by a gas company of its regulations as to buildings that had already been constructed, does not estop the company from enforcing the regulations as to new buildings constructed with notice of the rules. *State ex rel. Hallett v. Seattle Lighting Co.* 81

GENERAL DENIAL:

See **PLEADING**, 2.

GRANTS:

Conveyance of easement as affecting preference right to purchase shore lands, see **PUBLIC LANDS**, 4.

GUARANTY:

1. **GUARANTY—CONSTRUCTION—LIABILITY.** A written guaranty of advances to be made to a corporation covers a sum advanced upon the promissory note of the company, signed also by two others who were officers and stockholders of the company, the testimony showing that the money went to the credit of the company. *Bank of California v. Union Packing Co.* 456
2. **GUARANTY—NOTICE OF ACCEPTANCE—NECESSITY.** No notice of acceptance, other than the performance of the consideration, is essential to a written guaranty of advances to be made to a corporation by a bank whereby the guarantors unconditionally agree to pay,

GUARANTY—CONTINUED.

and request the bank to advance the money, and reciting that "this is a continuing guaranty and requires no notice to us and is to remain in force until canceled by notice in writing." *Bank of California v. Union Packing Co.* 456

3. **GUARANTY—CONSTRUCTION—LIABILITY—COSTS.** A guaranty of all advances to be made to a corporation covers attorney's fees provided for in the note given for the moneys advanced. *Bank of California v. Union Packing Co.* 456

GUARDIAN AND WARD:

Granting guardianship of orphan, see **ADOPTION**.

1. **GUARDIAN AND WARD—JURISDICTION—RESIDENCE.** A finding that the residence of a child was at King county, is warranted, where it appears that its mother had been staying there before leaving for New York, intending to return to take up new work there, and left the child there with relatives of the father, although prior thereto she had spent some time with her own parents in Kitsap county. *In re Wells* 518
2. **GUARDIAN AND WARD—ACTION ON BOND—OFFSET—SUPPORT OF WARD—WAIVER.** Where a mother, having no estate of her own, acted as guardian for her minor son, and filed a report making no charge for support up to that time, but afterwards converted the estate, the report shows that she did not intend to charge for support previous to the report, and in the absence of other evidence overcomes the presumption to the contrary; and the surety on her bond cannot offset against its liability a charge in favor of the guardian for support prior to the filing of the report. *In re Mackall* 655

HABEAS CORPUS:

To recover possession of child, see **INFANTS**.

HARBOR AREA:

Right to lease as property subject to condemnation, see **EMINENT DOMAIN**, 1.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 25-28.

HIGHWAYS:

Defects or obstructions in city streets, see **MUNICIPAL CORPORATIONS**, 9.

Navigable waters as public highways, see **NAVIGABLE WATERS**.

Accidents at railroad crossings, see **RAILROADS**, 2-4.

Reforming state deed of tide lands to exempt state aid road, see **REFORMATION OF INSTRUMENTS**.

Collisions between street cars and vehicles, see **STREET RAILROADS**, 7, 8.

HIGHWAYS—CONTINUED.

1. **HIGHWAYS—RUNAWAY TEAM—NEGLIGENCE—SUFFICIENCY.** In an action for injuries caused by a runaway team, a verdict for the defendants is properly directed where there was nothing to show what caused the team to run away, or that it was a fractious team, and it appeared that the defendants were not negligent and did all in their power to control it. *Kimble v. Stackpole* 35
2. **HIGHWAYS—RUNAWAY TEAM—PLEADING—GENERAL DENIAL—ISSUES AND PROOF.** In an action for injuries caused by a runaway team, a general denial of an allegation that the team, while under the joint control of the defendants, ran into the plaintiff, admits of evidence upon the part of the defense that the team was running away and beyond the control of the defendants. *Kimble v. Stackpole* 35

HOTELS:

Inspection law as class legislation, see **CONSTITUTIONAL LAW**, 1.
Effect of partial invalidity of hotel inspection law, see **STATUTES**.

HUSBAND AND WIFE:

- Survival of action by husband for personal injuries, see **ABATEMENT AND REVIVAL**.
- Descent of community property on death of wife, see **DESCENT AND DISTRIBUTION**, 1.
- Divorce and judicial separation, see **DIVORCE**.
- Homestead as community property, see **PUBLIC LANDS**, 1.
- Competency as witnesses, see **WITNESSES**.
1. **HUSBAND AND WIFE—COMMUNITY PROPERTY—CONVEYANCES—MORTGAGES.** In the absence of fraud or deceit, a mortgage upon community property executed by the wife alone is void. *Olson v. Springer* 77
 2. **SAME—MORTGAGES—ESTOPPEL.** A husband, to whom a loan of \$700 was made, secured by a note and mortgage upon community property executed by the wife alone, is not estopped to question the validity of the mortgage lien by the fact that he consented to the execution and delivered the mortgage, and that the community would be liable for money had and received. *Olson v. Springer* 77
 3. **HUSBAND AND WIFE—COMMUNITY DEBT—PERSONAL JUDGMENT AGAINST WIFE.** In an action upon a note executed by the husband alone, personal judgment against the wife is unauthorized, the plaintiffs being confined to establishing the community character of the indebtedness. *Anderson v. Burgoyne* 511
 4. **HUSBAND AND WIFE—SEPARATE MAINTENANCE—ABANDONMENT—EVIDENCE—SUFFICIENCY.** An abandonment of a wife is shown where, although the parties continued to live in the same house, the husband refused to treat her as his wife, or converse with her, or allow her credit for necessities, and insisted upon her getting a divorce. *Herrett v. Herrett* 607

HUSBAND AND WIFE—CONTINUED.

5. **SAME—NONSUPPORT—EVIDENCE—SUFFICIENCY.** The evidence justifies a decree for separate maintenance, although the husband allowed the wife to live in the same house and provided groceries and paid laundry and doctor's bills, where he had abandoned her, refused her credit for clothing, and by his treatment sought to force her to obtain a divorce. *Herrett v. Herrett* 607
6. **SAME—ALLOWANCE—AMOUNT.** Separate maintenance in the sum of \$50 per month, \$220 for money borrowed, and \$75 attorney's fees. is justified, where the community property was valued at \$30,000. *Herrett v. Herrett* 607

IMPEACHMENT:

Controverting recitals of judgment of nonsuit, see JUDGMENT, 15.

IMPRISONMENT:

For debt as violation of constitutional guaranty of personal liberty, see CONSTITUTIONAL LAW, 2.

IMPROVEMENTS:

Liens, see MECHANICS' LIENS.

Public improvements, see MUNICIPAL CORPORATIONS.

As giving preferential right to purchase tide lands, see PUBLIC LANDS, 3.

Offsetting value of against rent in action denying specific performance, see SPECIFIC PERFORMANCE, 3.

INCEST:

Wife as witness in prosecution of husband for, see WITNESSES.

INCONSISTENT DEFENSES:

See PLEADING, 2.

INCORPORATION:

Recovery of unearned portion of liquor license upon incorporation of town, see INTOXICATING LIQUORS, 2, 3.

INCUMBRANCES:

See CHATTEL MORTGAGES; MECHANICS' LIENS; MORTGAGES.

Giving mortgage as breach of condition against incumbrance, see INSURANCE, 2.

INDEMNITY:

See GUARANTY.

1. **INDEMNITY—FOR BAIL—CONTRACTS—VALIDITY—WHAT LAW GOVERNS.** A bond to indemnify bail furnished by a person convicted in a Federal court is not governed by Federal laws merely because the United States might have refused to accept bailors who had agreed

INDEMNITY—CONTINUED.

- to take indemnity, where the bailors were accepted by the United States and the bond was executed within, and between citizens of, this state. *Essig v. Turner*..... 175
2. **INDEMNITY—FOR BAIL—CONTRACTS—VALIDITY—PUBLIC POLICY.** Under the statutes of this state, authorizing a prisoner to deposit money in lieu of bail, a bond to indemnify sureties on a bail bond is not void as against public policy in that it removes the inducement for vigilance; especially where the indemnifying bond increased the number of persons interested in securing the presence of the prisoner. *Essig v. Turner*..... 175
3. **SAME—CONSIDERATION FOR INDEMNITY FOR BAIL.** A bond to indemnify the sureties on a bail bond is not void for want of consideration because executed after the giving of the bail, the recital showing that it was given to induce the continuance of the bail. *Essig v. Turner* 175
4. **SAME—BONDS—EXECUTION—EVIDENCE—SUFFICIENCY.** The execution of an indemnity bond is sufficiently shown, although the sureties insisted that they only signed a blank sheet of paper which was subsequently attached to the writing, where the bond, typewritten, itself shows that it could not have been executed in that way, the signatures appearing in regular order over lines regularly spaced therefor. *Essig v. Turner*..... 175

INDEPENDENT CONTRACTORS:

Liability of master for injuries by independent contractor in general, see MASTER AND SERVANT, 24-26.

INDICTMENT AND INFORMATION:

See LARCENY.

Remand for sentence for included lesser crime after reversal, see CRIMINAL LAW, 4.

Right of state to appeal when indictment insufficient, see CRIMINAL LAW, 6.

1. **INDICTMENT AND INFORMATION—LESSER OFFENSE INCLUDED IN CHARGE—DEGREE OF ASSAULT—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 2415, providing that every person who shall commit an assault or an assault and battery not amounting to assault in either the first or second degrees, shall be guilty of assault in the third degree, an assault in the third degree is not necessarily included in the greater offense, and there can be no conviction of assault in the third degree, under a charge of assault with intent to commit a felony (second degree assault), where the evidence of the prosecutrix showed a consummated rape, and that of the defendant proved an alibi, and there was no evidence of assault in the third degree. *State v. Kruger*..... 542

INFANTS:

See **ADOPTION; GUARDIAN AND WARD.**

Care required as to children on street railway tracks, see **STREET RAILROADS**, 6, 11.

1. **INFANTS—ABANDONED CHILDREN — CUSTODY — STATUTES — HABEAS CORPUS TO RECOVER—DEFENSES.** A preliminary order for the temporary custody of an abandoned child until notice could be given the mother and a hearing had, under Rem. & Bal. Code, § 1701, the statute contemplating an early hearing by giving such cases precedence, is no defense to *habeas corpus* by the mother to recover possession of her child, where no process was served on her as required by the statute and no further proceedings were had or final order made. *State ex rel. Stitt v. Reynolds*..... 12
2. **SAME—PRIMA FACIE CASE—HEARING.** In such a case, Rem. & Bal. Code, § 1706, making the final order *prima facie* evidence that the abandoned child was properly surrendered to the society has no application; and the court should hear the *habeas corpus* proceedings on the merits. *State ex rel. Stitt v. Reynolds*..... 12

INFORMATION:

Criminal accusation, see **INDICTMENT AND INFORMATION.**

INHERITANCE:

See **DESCENT AND DISTRIBUTION.**

INJUNCTION:

Cessation of controversy on appeal from dismissal of action to enjoin execution of contract, see **APPEAL AND ERROR**, 4.

Supersedeas on appeal from injunction against prosecution of state and Federal canal work, see **APPEAL AND ERROR**, 13.

To protect trespass in city street pending condemnation, see **EMINENT DOMAIN**, 5.

Enjoining issuance of certificates on contracts for filling tide lands, see **PUBLIC LANDS**, 2.

1. **INJUNCTION — PARTIES — PUBLIC LANDS—INTEREST OF STATE—TIDE LAND FILLS.** The state is not a necessary party to an action to enjoin the commissioner of public lands from issuing excessive lien certificates on a contract for filling tide lands, the state having sold the lands and not being liable for the price of the fills or having any interest in the matter except as benefited by the waterway, as to which no relief was sought; the whole controversy being between the contractors and the owners of the land. *Bussell v. Ross*..... 344

INNKEEPERS:

Effect of partial invalidity in hotel inspection law, see **STATUTES.**

INSANE PERSONS:

Act withdrawing defense of insanity as denial of due process of law, see CONSTITUTIONAL LAW, 5.

Insanity as defense to criminal prosecution in general, see CRIMINAL LAW, 1-3, 7.

1. **INSANE PERSONS—CRIMINAL LAW—INTENT.** Under the common law, intent was necessary to constitute a criminal act, and hence an insane person incapable of forming a criminal intent was not responsible for crime. *State v. Strasburg*..... 106
2. **INSANE PERSONS—CRIMINAL LAW—QUESTION OF FACT.** The question of the insanity of the accused at the time of the commission of the act charged is one of fact. *State v. Strasburg*..... 106
3. **INSANE PERSONS—RESTRAINT—PUNISHMENT.** An act providing punishment for the criminal insane by restraint beyond the necessities of protection to society after the complete restoration to sanity, is void. *State v. Strasburg*..... 106

INSOLVENCY:

Receiving deposits after insolvency, see BANKS AND BANKING.

INSPECTION:

Validity of hotel inspection law, see CONSTITUTIONAL LAW, 1, 2.

Effect of partial invalidity in hotel inspection law, see STATUTES.

INSTRUCTIONS:

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 28.

In civil actions, see TRIAL, 4.

INSURANCE:

As between mortgagor and mortgagee, see MORTGAGES, 4.

1. **INSURANCE—POLICY—CONDITIONS ON BACK.** Conditions and stipulations printed on the back of a fire insurance policy and not mentioned or referred to on the face of the policy are not part of the policy or binding on the assured. *Burbank v. Pioneer Mutual Insurance Association* 253
2. **INSURANCE—CHANGE OF OWNERSHIP—INCUMBRANCE.** Where a policy of fire insurance was made payable to a specified mortgagee, "as interest may appear," the giving of a second mortgage to the same mortgagee to secure a further loan is not a breach of the conditions against change of ownership, increase of hazard or subsequent incumbrance, the policy meaning "as interest may appear" at the time of the loss. *Fenton v. Cascade Mutual Fire Association*... 389
3. **INSURANCE—NONPAYMENT OF PREMIUM—NOTICE TO MORTGAGEE.** A policy of fire insurance, issued and delivered without prepayment of the premium, is an executed contract, and the presumption is that credit was given and the time for paying the premium extended,

INSURANCE—CONTINUED.

- and if payable to a mortgagee, it cannot be forfeited without notice to the mortgagee and demand. *Fenton v. Cascade Mutual Fire Association* 389
4. INSURANCE—POLICY—FORFEITURE—PROHIBITED EMPLOYMENTS. A life insurance policy containing a prohibition against engaging in mining or prospecting is not forfeited by a visit to mines in which the insured was interested. *Butler v. Supreme Court of The Independent Order of Forresters*..... 171
5. INSURANCE—PROOFS OF LOSS—WAIVER. Proofs of loss by fire are waived by denying all liability for the loss. *Burbank v. Pioneer Mutual Insurance Association* 253
6. SAME—AUTHORITY OF ADJUSTER—WAIVER OF PROOFS. An insurance adjuster authorized to adjust a fire loss has authority to waive proofs of loss required by the policy. *Burbank v. Pioneer Mutual Insurance Association* 253
7. INSURANCE—ACTIONS—PROOF OF DEATH—EVIDENCE—ADMISSIBILITY. Upon the sudden disappearance of an insured, whose absence was never accounted for, it is permissible to show his general character by evidence of his previous conduct. *Butler v. Supreme Court of The Independent Order of Forresters*..... 171
8. INSURANCE — ACTIONS — PROOF OF DEATH — QUESTION FOR JURY. Whether the insured, whose absence was unexplained for many years, met his death shortly after leaving home and while the policy was still in force, is for the jury, where it appears that he was industrious and of good habits and left a wife and young children, with whom he was living pleasantly, saying that he was going on a short trip to mines, in which he was interested, and which were in a wild mountainous country, and was never again heard from, although diligent search was made for him at the time of his disappearance. *Butler v. Supreme Court of The Independent Order of Forresters* 171
9. INSURANCE—BENEFICIARY CERTIFICATES — ASSESSMENTS — ACCEPTANCE—REINSTATEMENT—ESTOPPEL. A beneficiary society ratifies the acceptance of dues and is estopped from claiming that the member was not reinstated by a payment within the sixty-day period for reinstatement by payment if the member was in good health, where the society had notice at the time that the member was not in good health, but nevertheless retained the payment for over a year after the member's death, and made no tender of repayment until four months after suit was brought on the policy. *Schuster v. Knights and Ladies of Security*..... 42
10. SAME—BY-LAWS—WAIVER OF FORFEITURE—VALIDITY. In such a case, a by-law providing that the receipt and retention of dues of a member not in good health shall not reinstate the member is void. *Schuster v. Knights and Ladies of Security*..... 42

INSURANCE—CONTINUED.

11. **SAME—AGENCY—LOCAL SECRETARY.** The local secretary of a beneficiary society, authorized to collect assessments, is the agent of the society. *Schuster v. Knights and Ladies of Security*..... 42

INTENT:

As element of crime, see **CRIMINAL LAW**, 1-3; **INSANE PERSONS**.

INTERPLEADER:

Action for, see **ACCOUNT**.

INTOXICATING LIQUORS:

1. **INTOXICATING LIQUORS—LICENSES—DRUGGISTS — STATUTES — CONSTRUCTION.** The act of 1907 (Rem. & Bal. Code, § 6269 *et seq.*), prohibiting the sale of intoxicating liquors by any person without first obtaining a state license in addition to county or municipal licenses, being primarily a revenue measure, is not *in pari materia* and to be construed in connection with the general act of 1888 (Rem. & Bal. Code, § 6275, etc.), for the regulation of the liquor traffic, which exempted from its operation druggists dispensing liquors on the written prescription of a reputable physician; hence the provisions of both acts may be enforced, and druggists must procure a state license under the revenue act, although not required to do so under the regulative act. *State v. Putnam*..... 386
2. **INTOXICATING LIQUORS—LICENSE—RECOVERY OF FEE—LIABILITY OF COUNTY—INCORPORATION OF TOWN.** The unearned portion of a county liquor license can be recovered by the licensee when his license has become inoperative by reason of the incorporation as a town of the territory in which his saloon was conducted, where the same has not passed beyond the county's control. *Bart v. Pierce Co.* 507
3. **SAME—DEFENSES—COUNTY FUNDS — ACTIONS — MULTIPLICITY OF SUITS.** A county cannot escape repayment of the unearned portion of a liquor license, which has become inoperative, by the fact that the same has been transferred to the county school fund, and transferred to the school districts; since the school fund is a continuing fund under the control of the county, and the rule against a multiplicity of suits forbids separate actions against each school district, as such course is not necessary. *Bart v. Pierce County*..... 507

JOINDER:

Of parties in action on note, see **ACTION 1**.
Of heirs in action for death, see **DEATH**, 2.

JOINT TENANCY:

Coparcenary, see **TENANCY IN COMMON**.

JUDGES:

See JUSTICES OF THE PEACE.

Harmless error in comment on evidence, see APPEAL AND ERROR, 25.

Comment on evidence, see TRIAL, 4.

JUDGMENT:

Against nonappearing sureties on bond to release vessel, in foreclosure action, see ACTION, 4.

Review in general, see APPEAL AND ERROR.

Appealability, see APPEAL AND ERROR, 1, 2.

Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 29.

Presumption of service of process to support personal judgment, see APPEAL AND ERROR, 20.

Payment of by owner in mechanics' lien foreclosure and right to contribution, see CONTRIBUTION.

Laches in commencing action for vacation of, see DIVORCE.

Relief under deed intended as mortgage, see EJECTMENT.

Estoppel of wife by divorce decree from claiming title to property, see ESTOPPEL, 1.

Personal judgment against wife in action on note executed by husband, see HUSBAND AND WIFE, 3.

Purchasers *pendente lite*, see LIS PENDENS.

1. JUDGMENT—DEFAULT—PRESUMPTIONS—VACATION. A party has a right to presume that the plaintiff will not take a different default judgment than the facts alleged warrant. *Anderson v. Burgoyne* 511
2. JUDGMENTS—VACATION—EQUITABLE RELIEF—LIMITATIONS. Relief against a judgment may be granted in equity after the expiration of one year from the date of its entry, where the parties had no actual notice of the matter complained of until a few days before the action was commenced, nor notice of the facts sufficient to put them on inquiry. *Anderson v. Burgoyne*..... 511
3. JUDGMENT—VACATION—ESTOPPEL—DISCRETION. It is not an abuse of discretion to vacate a void default judgment against a corporation, where the claim of estoppel to dispute the judgment was met by counter affidavits. *Lushington v. Seattle Auto and Driving Club* 546
4. SAME—AFFIDAVIT OF MERITS. Upon a motion to vacate a default judgment, for the reason that no service was had upon the defendant, an affidavit of merits is not necessary. *Lushington v. Seattle Auto and Driving Club*..... 546
5. SAME—TIME FOR APPLICATION—LACHES. A motion to vacate a judgment, void for want of jurisdiction over the person of defendant, may be made at any time without regard to laches. *Lushington v. Seattle Auto and Driving Club*..... 546
6. JUDGMENT—FORM—CONSOLIDATED ACTIONS—MULTIPLICITY OF SUITS. A technical objection to the form of a judgment, in consolidated actions, which simply avoids a multiplicity of suits, is not ground for reversal. *Sweeney v. Archibald*..... 595

JUDGMENT—CONTINUED.

7. JUDGMENT—VACATION—PROCESS—SERVICE—PROOF—SUFFICIENCY—APPEARANCE—AUTHORITY. It is error to vacate a judgment and dismiss the action for want of jurisdiction over the person of the defendant, where the affidavit of the deputy sheriff showed service on the defendant; and a demurrer was served by an attorney purporting to represent the defendant, and neither the attorney nor the secretary-treasurer of the defendant explicitly denied the authority of the attorney to represent the defendant. *Molloy v. Union Transfer, Moving & Storage Co.*..... 331
8. JUDGMENTS—VACATION—IRREGULARITY—NOTICE OF PROCEEDINGS. It is discretionary for the trial court to vacate a judgment which was entered against a defendant, who had appeared by the service of a demurrer, without the framing of any issues, or notice of the trial, or any claim or entry of default, in view of Rem. & Bal. Code, § 241, entitling a defendant after appearance to notice of all proceedings. *Molloy v. Union Transfer, Moving & Storage Co.*..... 331
9. JUDGMENT—VACATION—ACTIONS—DISMISSAL. Upon the vacation of a judgment for the want of jurisdiction over the person of defendant, the action is still pending, and it is error to dismiss the same, the time for the service of process not having expired. *Molloy v. Union Transfer, Moving & Storage Co.*..... 331
10. JUDGMENT—RES JUDICATA—DISMISSAL ON THE MERITS. In an action to quiet title, a formal judgment reciting that after the plaintiffs had rested and their case being fully closed, the case was dismissed "for lack of equity," conclusively shows a decision on the merits; and the same is *res judicata* and a bar to another action between the same parties seeking the same relief. *Nunn v. Mather* 484
11. JUDGMENT—RECORD—CONCLUSIVENESS. The formal signed judgment showing a dismissal on the merits cannot be controlled or affected by the clerk's informal journal entry indicating a judgment of nonsuit only. *Nunn v. Mather*..... 484
12. JUDGMENTS—RES JUDICATA—JUDGMENTS NOT FINAL. The denial of a motion to vacate an order sustaining a demurrer in a garnishment proceeding is not final, and is accordingly not *res judicata*. *Anderson v. Burgoyne*..... 511
13. JUDGMENT—BAR—DIRECTION OF VERDICT—FORM—CONCLUSIVENESS. A judgment reciting that the defendant challenged the legal sufficiency of the evidence and moved the court to decide, as a matter of law, that the defendants were entitled to a verdict in their favor, and that the jury be discharged and judgment entered in favor of the defendants upon the ground that the plaintiff failed to prove a sufficient cause for the jury and granting the motion in all things, is a judgment on the merits and a bar to another action, under Rem. & Bal. Code, § 340, requiring the court to decide, as a matter of law,

JUDGMENT—CONTINUED.

what verdict shall be found, etc.; and not a judgment of nonsuit under Id., § 408, for plaintiff's failure "to prove a sufficient cause for the jury." *McKim v. Porter* 270

14. JUDGMENT—RES JUDICATA—BAR—VACATION OF JUDGMENT. The denial of a motion to vacate a tax judgment, entered in the court below on the ground that the moving party had adopted the wrong procedure, but affirmed in the supreme court upon the merits of the application, is *res judicata* and bars a subsequent suit in equity to set aside the tax judgment and tax deed on the same grounds. *Boylan v. Bock* 423
15. JUDGMENT—CONCLUSIVENESS—BAR—NONSUIT—IMPEACHMENT. A judgment at the close of plaintiff's case upon defendant's motion for a nonsuit, expressly granting a nonsuit, and for defendant's costs, is not a bar to another action, under the provisions of Rem. & Bal. Code, §§ 408-410; and its plain recitals cannot be controverted by a showing that it was in fact on the merits. *Alberg v. Campbell Lumber Co.* 533

JURISDICTION:

Summary judgment against nonappearing sureties on bond to release vessel, in foreclosure action, see ACTION, 4.
 Appellate jurisdiction, see APPEAL AND ERROR.
 Appointment of receiver for corporation, see CORPORATIONS, 6.
 In suit against foreign corporation, see CORPORATIONS, 1, 2.
 Criminal prosecutions, see CRIMINAL LAW, 5, 6.
 Election contests, see ELECTIONS, 5, 6.
 Residence of child sufficient to confer jurisdiction, see GUARDIAN AND WARD, 1.
 Validity of judgment dependent on jurisdiction of the person, see JUDGMENT, 5, 7-9.
 Justices' courts in civil cases, see JUSTICES OF THE PEACE.
 Sufficiency of summons for jurisdictional purposes, see PROCESS.

JURY:

Denial of right to jury trial on all questions of fact as denial of due process of law, see CONSTITUTIONAL LAW, 3, 5.
 Trial by jury of issues in equity, see EQUITY.
 Instructions in civil actions, see TRIAL, 4.
 Taking case or question from jury at trial, see TRIAL, 3.

1. JURY—RIGHT TO JURY TRIAL. Const., art. 1, § 21, providing that the right to trial by jury shall remain inviolate, means that the right, as it existed in the territory when the constitution was adopted, shall continue unimpaired and inviolate. *State v. Strasburg* 106

JUSTICES OF THE PEACE:

1. **JUSTICE OF PEACE—JURISDICTION—MUNICIPAL CORPORATIONS—VIOLATION OF ORDINANCES—STATUTES—AMENDMENT.** The amendment of Bal. Code, § 4683, which conferred upon justices of the peace jurisdiction in all criminal causes arising under any city or town ordinance, by Rem. & Bal. Code, § 46, which omitted the reference to city ordinances and provided that justices shall have jurisdiction of all misdemeanors, does not deprive justices in towns of the fourth class of jurisdiction in causes arising under a town ordinance, in view of the intent of the amending act to merely enlarge the jurisdiction, and of Rem. & Bal. Code, § 7735½, providing that the violation of any ordinance of a town of the fourth class shall be a misdemeanor. *State ex rel. Hall v. Wicker* 238
2. **JUSTICE OF PEACE—VENUE—CHANGE OF VENUE—POLICE COURT—MUNICIPAL CORPORATIONS—ORDINANCES—VIOLATION.** A change of venue lies from a police justice to a justice of the peace, in prosecutions for the violation of a town ordinance, under Rem. & Bal. Code, § 1774, granting the right to a change of venue in justice court, and § 7748, providing that a police justice in towns of the fourth class shall be governed by the general laws relating to justices of the peace. *State ex rel. Hall v. Wicker* 238

KNOWLEDGE:

As affecting assumed risk, see **MASTER AND SERVANT**, 12.

LABOR:

See **WORK AND LABOR**.

LABOR UNIONS:

See **TRADE UNIONS**.

LACHES:

In action to rescind sale of corporate stock, see **CORPORATIONS**, 8.

In commencing action to vacate divorce decree, see **DIVORCE**.

As affecting time for application to vacate judgment, see **JUDGMENT**, 5.

LANDLORD AND TENANT:

Right to lease harbor area as interest subject to condemnation, see **EMINENT DOMAIN**, 1.

Requirements of statute of frauds as to leases, see **FRAUDS, STATUTE OF**, 1.

Offsetting value of improvements against rent upon denying specific performance, see **SPECIFIC PERFORMANCE**, 3.

1. **LANDLORD AND TENANT—ASSIGNMENT OF LEASE—CONTRACTS—CONSTRUCTION.** A written contract whereby a party desiring to purchase a lease agreed to pay for the use of the premises, to the assignee of the lease, monthly during its term, a fixed sum in addition to the monthly rent which the original assignee is obliged to pay to the lessor, is in law an assignment of the lease. *American Savings Bank & Trust Co. v. Mafridge* 180

LANDLORD AND TENANT—CONTINUED.

2. LANDLORD AND TENANT—LEASE—CONTRACTS—MUTUALITY. A contract whereby a party agrees to pay the assignee of a lease, for the use of the leased premises, a fixed sum monthly during the term of the lease in addition to the rent, signed by both parties, is on its face a mutual contract and enforceable. *American Savings Bank & Trust Co. v. Mafridge* 180
3. LANDLORD AND TENANT—ASSIGNMENT OF LEASE—CONTRACTS—BREACH—ACCEPTANCE OF RENT. Where the plaintiff, being assignee of a lease, sold the same to defendant, and defendant's corporation in possession afterwards went into the hands of a receiver, acceptance of the rent for two months from the receiver, and receipt of the key, will not prevent the plaintiff from recovering from the defendant the balance due on the contract, where the evidence shows he did not intend to release the defendant. *American Savings Bank & Trust Co. v. Mafridge* 180
4. LANDLORD AND TENANT—ASSIGNMENT OF LEASE—BREACH—DAMAGES. The assignee of a lease, after breach, and sale of the lease at his request to lessen the damages, is liable for the rent to the time of the breach, and for the present value of the monthly payments due to the assignor in the future, at the legal rate of interest, less the sum for which the lease was sold. *American Savings Bank & Trust Co. v. Mafridge* 180
5. LANDLORD AND TENANT—DANGEROUS PREMISES—LIABILITY OF TENANT—THEATERS AND SHOWS—INJURY TO SPECTATOR—CARE. A lessee, for one night only, for the purpose of giving a public entertainment, of a new state armory, constructed under laws providing for rigid supervision by state officials and experts employed by them, owes no duty to spectators to make an expert inspection of a balcony rail which was apparently safe; only reasonable, and not extraordinary care being required. *Greene v. Seattle Athletic Club* 300

LANDS:

See PUBLIC LANDS.

LARCENY:

Receiving deposits after insolvency of bank, see BANKS AND BANKING.

1. LARCENY—INFORMATION—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS. Under a prosecution for the larceny of meat, groceries and other articles of food supplies, evidence of the misappropriations of gunny-sacks is inadmissible; and the error is intensified by instructing the jury that before finding the defendant guilty of stealing gunny-sacks, they must find that they were of some appreciable value. *State v. Smith* 399

LAW OF THE CASE:

- Decision on appeal as law of the case on new trial, see **APPEAL AND ERROR**, 29.
- Res adjudicata, see **JUDGMENT**, 10-15.

LEASES:

- See **LANDLORD AND TENANT**.

LEGISLATURE:

- Extent of power to eliminate intent in defining crime, see **CRIMINAL LAW**, 1.
- Contesting nomination of candidates, see **STATES**.

LEVY:

- Of taxes, see **TAXATION**.

LICENSES:

- Sale of intoxicating liquors, see **INTOXICATING LIQUORS**.

LIENS:

- Maritime liens, see **ACTION**, 4.
- Lien of attorney for compensation, see **ATTORNEY AND CLIENT**.
- Mortgage, see **CHATTEL MORTGAGES**.
- Payment of judgment for mechanics' lien and right of contribution, see **CONTRIBUTION**.
- Effect of *lis pendens* on prior party wall lien, see **LIS PENDENS**, 1.
- On logs, see **LOGS AND LOGGING**, 3.
- Liens of mechanics and materialmen, see **MECHANICS' LIENS**.
- Mortgage liens, see **MORTGAGES**.
- Tax lien, see **TAXATION**.

LIFE INSURANCE:

- See **INSURANCE**, 4, 7-11.

LIMITATION OF ACTIONS:

- Proceedings constituting commencement of action in general, see **ACTION**, 2, 3.
 - To vacate judgment, see **JUDGMENT**, 2.
 - Recovery of excess in special assessment fund and retroactive effect of statute, see **MUNICIPAL CORPORATIONS**, 8.
 - Action by owner to set aside tax proceedings, see **TAXATION**, 6.
1. **LIMITATION OF ACTIONS—REMOVAL OF BAR—CONSTITUTIONAL LAW—DUE PROCESS.** The legislature has power by a retroactive law to take away the natural right of a municipal corporation to plead the statute of limitations against a moral claim which in good conscience it ought to pay; and the same does not violate the due process clause of the constitution. *State ex rel. McCullough v. Seattle* 241

LIQUORS:

See INTOXICATING LIQUORS.

LIS PENDENS:

1. **LIS PENDENS—EFFECT ON PRIOR LIENS—MORTGAGES—FORECLOSURE.**
A *lis pendens* in a mortgage foreclosure suit does not affect a party-wall lien prior to the mortgage, the owners of the lien not being made parties to the mortgage foreclosure. *Biggs v. Hoffman*.... 495
2. **LIS PENDENS—RULE OF—EFFECT—APPEAL—BENEFIT OF.** After the filing of a *lis pendens*, a grantee of the real estate, the subject-matter of the suit, is entitled to the benefit of an appeal taken by his grantor, the rule of *lis pendens* being that the action may proceed without any notice being taken of the grantee *pendente lite*. *Trumbull v. Jefferson County* 479

LOCATION:

Of boom site, see LOGS AND LOGGING, 1.

LOGS AND LOGGING:

Agreement for sale of timber as within statute of frauds, see FRAUDS, STATUTE OF, 2.

Floating of logs on navigable streams, see NAVIGABLE WATERS.

Certainty of land and timber contract to authorize specific performance, see SPECIFIC PERFORMANCE, 1.

Assessing tax on timber, see TAXATION, 1-4.

Cutting or carrying away timber, see TRESPASS.

1. **LOGS AND LOGGING—BOOM COMPANIES—SITES.** A boom company has a discretion as to the location of its boom site which cannot be controlled by the courts, in the absence of bad faith or legislative restriction. *State ex rel. United Tanners Timber Co. v. Superior Court* 193
2. **SAME—NAVIGABLE WATERS—OBSTRUCTION BY BOOM.** A boom company may temporarily obstruct a river for such time as may be necessary to sort and pass the logs of the owners below. *State ex rel. United Tanners Timber Co. v. Superior Court* 193
3. **LOGS AND LOGGING—LIENS—TOOLS.** A lien upon logs cannot be claimed for a cable, boom chains, shoeing horses, and like articles furnished merely as tools and appliances for carrying on the work of logging. *Braeger v. Bolster & Barnes* 579

MACHINERY:

As fixture, see FIXTURES.

Liability of employer for defects, see MASTER AND SERVANT, 1-5.

MAINTENANCE:

Right of wife to allowance for maintenance, see HUSBAND AND WIFE, 4-6.

MANDAMUS:

Cessation of controversy on appeal from mandamus proceedings, see **APPEAL AND ERROR**, 3.

Right to mandamus and avoidance of costs on appeal from denial of writ, see **COSTS**, 2.

1. **MANDAMUS—WHEN LIES—ELECTIONS—CERTIFICATION OF CANDIDATES.** Mandamus does not lie, as a matter of right, to compel the county auditor to place the names of candidates upon a ballot until they have been, or it is certain that they will be, certified to the auditor. *State ex rel. Shepard v. Superior Court* 370
2. **MANDAMUS—ANSWER—FORM—SUFFICIENCY.** An affidavit is sufficient as an answer in mandamus, where the allegations of the complaint and alternative writ were put in issue thereby and the same was in effect an answer, and after demurrer thereto there was a trial on the merits. *State ex rel. Hallett v. Seattle Lighting Co.* 81

MARITIME LIENS:

Rendition of judgment against nonappearing sureties on bond to release vessel, in foreclosure action, see **ACTION**, 4.

MARRIAGE:

Relation of husband and wife, privileges and disabilities of coverture, and separation by agreement, see **HUSBAND AND WIFE**.

MASTER AND SERVANT:

Survival of action for personal injuries, see **ABATEMENT AND REVIVAL**.

Trade unions, see **TRADE UNIONS**.

Recovery for services, see **WORK AND LABOR**.

1. **MASTER AND SERVANT—SAFE APPLIANCES—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** A nonsuit is properly granted in an action for personal injuries sustained by an employee in a laundry, caused by throwing his arm into a machine when his foot slipped, where the machine was of standard make, in common use, the dangers were obvious, and no negligence on the part of the defendant was shown. *Meyers v. Ideal Steam Laundry* 134
2. **MASTER AND SERVANT—SAFE PLACE—ACT OF FOREMAN—FELLOW SERVANTS.** Railroad contractors are liable to an employee, engaged on a steep hillside, for an injury sustained through the negligent act of their foreman in kicking a stump loose above the working place, causing a rock to roll down the hill; since they owed the non-delegable duty of furnishing a safe place to work and of keeping it safe; and it is immaterial that the act of kicking the stump loose was that of a fellow servant, since the foreman's duty of superintendence was a continuous one. *Campbell v. Jones* 265

MASTER AND SERVANT—CONTINUED.

3. MASTER AND SERVANT—NEGLIGENCE—APPLIANCE—EVIDENCE—SUFFICIENCY. It is actionable negligence to use a large link chain for holding a sling load of small dimension lumber, in lowering the same into the hold of a ship, whereby some of the pieces slipped from the load and fell upon a stevedore, where it appears that it was suitable only for large timbers, and it was customary to use a small chain, one witness testifying that difficulty was encountered in its use and complaint made to the foreman. *Lahti v. Rothchild* 438
4. MASTER AND SERVANT—NEGLIGENCE OF MASTER—SAFE APPLIANCES AND METHODS. Where it is not necessary for a signalman in a logging camp to go into a dangerous place to give a signal by hand, the master cannot be charged with negligence in failing to supply a whistle wire to give the signals. *Hage v. Luedinghaus* 680
5. MASTER AND SERVANT—NEGLIGENCE—METHODS OF WORK—LOADING LOGS—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence in adopting an unsafe method of work to make a question for the jury, where it appears that a train of logs was moved forward by attaching the loading chain to a log attached to the bunker of the car, and that this pulled up the bunker and load, causing loose logs on top of the load to roll down upon the plaintiff, who had been ordered by the foreman to go under the car to block a wheel. *Nelson v. Ballard Lumber Co.* 690
6. MASTER AND SERVANT—NEGLIGENCE OF VICE PRINCIPAL—ORDERING SERVANT INTO DANGEROUS PLACE—EVIDENCE—SUFFICIENCY. A signalman is not directly ordered by a vice principal to go into the bight of a logging cable to give a second signal, where he was simply signaled to start the engine, and could choose his place for giving the signal. *Hage v. Luedinghaus* 680
7. MASTER AND SERVANT—INCOMPETENT FELLOW SERVANTS—EVIDENCE—SUFFICIENCY. A "fireman" is not necessarily incompetent to run a donkey engine, where no particular skill was required and it is usual for either the engineer or the fireman to run it; and in the absence of evidence of his incompetency, it is not negligence to permit him to run the engine. *Hage v. Luedinghaus* 680
8. SAME. A single act of negligence is not sufficient to show that a fellow servant was incompetent. *Hage v. Luedinghaus* 680
9. MASTER AND SERVANT—FELLOW SERVANTS. A man running a donkey engine in a logging camp, and his signalman, are fellow servants. *Hage v. Luedinghaus* 680
10. MASTER AND SERVANT—ASSUMPTION OF RISKS—OBVIOUS DANGERS. An experienced man, capable of and running a woodyard in the absence of the owner, assumes the risks of injury from setting up and operating a saw near a pile of four foot slabs eighteen feet high, which was so dangerously high that any man ought to know that it

MASTER AND SERVANT—CONTINUED.

- was likely to fall at any time, according to the testimony of the plaintiff and his witnesses. *Deaton v. Abrams* 1
11. MASTER AND SERVANT—ASSUMPTION OF RISKS—VIOLATION OF FACTORY ACT. The defense of assumption of risks is not available to a master who has failed to comply with the statute requiring the guarding of machinery. *Anderson v. Pacific National Lumber Co.* 415
12. MASTER AND SERVANT—ASSUMPTION OF RISKS—COMPREHENSION OF DANGER. In such a case, an injured stevedore of long experience did not assume the risk, as a matter of law, where he testified that he had never had any experience with a chain of that size in handling small dimension lumber and did not know that it would not hold the pieces securely, and he had worked five or six days with the chain in question without any occurrence that would suggest the danger of pieces slipping from the load. *Lahti v. Rothchild* 438
13. MASTER AND SERVANT—PROMISE TO REPAIR—PLEADING. The objection cannot be raised that a promise to repair was not made by defendant's vice principal, where the answer fails to deny allegations of the complaint that the employees making the promise were defendant's foreman and head millwright; and the evidence showed that they did make the promises. *Easterly v. Eatonville Lumber Co.* 647
14. SAME—PROMISE—CONTEMPLATION OF CONTINUANCE. A promise to remedy an improper construction of a sawdust chute in a shingle mill which required increased subjection to danger in releasing the sawdust, must have been made in contemplation of the operator's continuance at work, where there was nothing said about abandoning the machine or permitting it to remain idle. *Easterly v. Eatonville Lumber Co.* 647
15. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—OBEYING ORDERS OF FOREMAN. A lineman on an electric railway is not guilty of contributory negligence in obeying an order of his foreman to push the tower car across a bridge, upon which they were when a work train was sighted half a mile away, the foreman having first ordered two men back to flag the train, as he had a right to assume that he would be protected. *Hillis v. Spokane & Inland Empire R. Co.* 7
16. SAME—RULES—NOTICE OF—DISOBEDIENCE BY FOREMAN. A lineman who had worked but twenty days for the company is not charged with an operating rule addressed to line foremen regarding protection of a tower car on the track by specified signals; and negligence of the foreman in failing to observe the rule cannot be attributed to the lineman. *Hillis v. Spokane & Inland Empire R. Co.* 7

MASTER AND SERVANT—CONTINUED.

17. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—DANGEROUS ACTS—EVIDENCE—SUFFICIENCY. An oiler is not guilty of contributory negligence, as a matter of law, in attempting to turn up a grease cup on a shaft, in a narrow space dangerously near an unguarded saw, where he was acting as instructed, in the usual and ordinary method, which from the construction of the mill was the only way in which the shaft could be oiled, and the cup had been operated in that way almost hourly for two or three months without accident *Anderson v. Pacific National Lumber Co.* 415
18. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of a shingle weaver in releasing sawdust in a chute near the saw with a short stick, after a promise by the master to repair the place, is for the jury, where that was the usual method. *Easterly v. Eatonville Lumber Co.* 647
19. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. A shingle weaver is not guilty of contributory negligence, as a matter of law, in releasing sawdust in a chute without stopping the saw, where it was not usual to do so, and would have consumed much time, and it appears that he used a short stick for the purpose according to the usual method, and only did so for a reasonable time after objection and promise to repair. *Easterly v. Eatonville Lumber Co.* 647
20. SAME—CONTRIBUTORY NEGLIGENCE—RELIANCE ON ORDERS. An employee engaged in loading cars does not assume the risks and is not guilty of contributory negligence in obeying a specific command of the foreman to go under a car to block the wheels, when the same was moved forward in a negligent manner by a cable attached to a log, which tipped the load onto him; since the dangers were not so open and apparent that no man of ordinary prudence would have obeyed the specific order given. *Nelson v. Ballard Lumber Co.* 690
21. MASTER AND SERVANT—NEGLIGENCE—PLEADING—ISSUE. The failure to prove one particular ground of negligence by a master is not ground for nonsuit, where the injury resulted from a combination of various acts, which combined might be negligent, although none of the acts considered alone were negligent. *Nelson v. Ballard Lumber Co.* 690
22. SAME—PLEADING. Such negligence is sufficiently charged in a complaint alleging that the defendant ordered the car moved forward, and adopted a careless and negligent manner of doing so, detailing the condition of the car and the manner of moving it; especially on motion for a nonsuit. *Nelson v. Ballard Lumber Co.* 690
23. MASTER AND SERVANT—NEGLIGENCE—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY. Statements of the deceased, a brakeman, to the effect that while in the performance of his duties he fell from the side of a car by reason of the giving way of a hand-hold, which were

MASTER AND SERVANT—CONTINUED.

part of the *res gestae*, made immediately after the accident and in the expectation of death, are sufficient to make a question for the jury as to the negligence of the company, notwithstanding evidence on behalf of the company that, upon examination of the cars next day, no defective hand-hold was discovered. *Riggs v. Northern Pac. R. Co.* 292

24. MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTORS—"FORCE ACCOUNT." Subcontractors on railroad construction who worked under a "force account" or agreement to furnish the tools, appliances, and men at actual cost, plus a fixed percentage as their profit, are independent contractors, and the relation of master and servant does not obtain between their servants and the railroad company. *Campbell v. Jones* 265

25. MASTER AND SERVANT—INDEPENDENT CONTRACTORS—EVIDENCE OF RELATION—ADMISSIBILITY. In an action for personal injuries, upon an issue as to whether the defendant employed the plaintiff or was only the lessor of the mill, evidence is admissible of conversations had with the defendant relative to a settlement of a prior accident with a casualty company at defendant's suggestion, and as to defendant's taking out casualty insurance covering accidents to the men. *Robinson v. Hill* 615

26. MASTER AND SERVANT—INDEPENDENT CONTRACTOR—QUESTION FOR JURY. In an action for personal injuries, a question as to the existence of a contract between the defendant and a third person making such third person an independent contractor, upon disputed evidence, is one of fact for the jury. *Robinson v. Hill* 615

MECHANICS' LIENS:

Enforcement of contribution by owner upon payment of judgment, see CONTRIBUTION.

Liens on logs and lumber, see LOGS AND LOGGING, 3.

Contractor's bond to secure laborers and materialmen on public work, see MUNICIPAL CORPORATIONS, 5.

1. MECHANICS' LIENS—NOTICE—MAILING—NECESSITY. Under Rem. & Bal. Code, § 1133, requiring a duplicate statement of all materials to be delivered or mailed to the owner "at the time" such material is delivered, a mechanics' lien cannot be claimed where it is admitted that the notice was not mailed until some indefinite time, a few weeks or a month, after delivering the materials. *Finlay v. Tagholm* 539
2. MECHANICS' LIENS—TIME OF FILING—EVIDENCE—SUFFICIENCY. In an action to foreclose a mechanics' lien, a finding that lumber was not delivered until after the 17th is not warranted by the evidence, where the teamster's receipt was dated that day, and there was evidence that it was made out on the day of delivery and was signed by the contractor; and such written receipt is not overcome by oral

MECHANICS' LIENS—CONTINUED.

evidence of the contractor, sixteen months later, that he was of the impression that the lumber was all laid before that day, supported by his foreman to the same effect, who quit work on the 18th, their testimony resting on memory. *Pacific Lumber & Timber Co. v. Dailey* 566

3. **MECHANICS' LIENS—WAIVER—BURDEN OF PROOF.** The burden of showing a waiver of a mechanics' lien, by clear, certain and unequivocal evidence, is upon the party asserting it. *Pacific Lumber and Timber Co. v. Dailey* 566
4. **MECHANICS' LIENS—WAIVER—EVIDENCE—SUFFICIENCY.** A waiver of a mechanics' lien, conditional upon giving a mortgage subject only to a mortgage of \$1,200, cannot be enforced where either the minds of the parties did not meet, or the property was subject to three mortgages aggregating more than that sum, and no tender of performance was made. *Pacific Lumber and Timber Co. v. Dailey* 566

METERS:

Reasonableness of rules of company for installation of, see **GAS**.

METHOD OF WORK:

Negligence in adopting unsafe method, see **MASTER AND SERVANT**, 4-6.

MINORS:

Death of minor and descent of property inherited from parent, see **DESCENT AND DISTRIBUTION**, 2.

Recovery of possession of child, see **INFANTS**.

MISREPRESENTATION:

By corporation in sale of shares, see **CORPORATIONS**, 7, 8.

Affecting validity of contract for sale of land, see **VENDOR AND PURCHASER**, 1, 2, 9.

MISTAKE:

Basis of claim for adverse possession, see **ADVERSE POSSESSION**.

As ground for cancellation of instruments, see **CANCELLATION OF INSTRUMENTS**.

Ground for reformation of instrument, see **REFORMATION OF INSTRUMENTS**.

Omitting property by assessor through mistake of law as invalidating tax, see **TAXATION**, 2.

MONEY:

Ownership of donated to county to induce construction of bridge, see **COUNTIES**, 3.

MORTGAGES:

- Appealability of orders relating to, see **APPEAL AND ERROR**, 2.
- Of personal property, see **CHATTEL MORTGAGES**.
- Foreclosure of in action to recover land, see **EJECTMENT**, 2.
- Fixtures as between mortgagor and mortgagee, see **FIXTURES**.
- Upon community property, see **HUSBAND AND WIFE**, 1, 2.
- As affecting mortgagee's right to recover on insurance policy, see **INSURANCE**, 2.
- Notice and demand to mortgagee of nonpayment of premium, see **INSURANCE**, 3.
- Lis pendens in foreclosure of as affecting prior party wall lien, see **LIS PENDENS**, 1.
- Acquisition of tax title by mortgagee, see **TAXATION**, 5.
- Purchase from purchaser at foreclosure sale as redemption inuring to benefit of cotenants, see **TENANCY IN COMMON**, 1.

- 1. **MORTGAGES—DEED AS MORTGAGE—SUBSISTING DEBT.** Whether an absolute deed was intended as a mortgage to secure a debt, depends generally upon whether there was an existing indebtedness or liability which was still left subsisting and not discharged. *Boyer v. Paine* 56
- 2. **SAME—EVIDENCE—SUFFICIENCY.** An obligation to build a canal and furnish water for irrigation, together with a contract for stipulated damages in case of default, to be performed in the future, is secured by an absolute deed, intended as a mortgage, where the same was not discharged by the deed but was left subsisting, and the performance of the contract was prosecuted after the deed was given. *Boyer v. Paine* 56
- 3. **SAME—REDEMPTION—RIGHT TO WAIVE.** Since a mortgagor cannot in his mortgage renounce his right of redemption, a stipulation to that effect in a deed intended as a mortgage is of no effect. *Boyer v. Paine* 56
- 4. **MORTGAGES—INSURANCE—RIGHTS OF MORTGAGOR.** Where a mortgage in trust for creditors stipulated that the mortgagor should keep the premises insured, he cannot, in an action to foreclose the mortgage, charge the trustee as mortgagee with the loss of property by fire which such mortgagee had failed to insure. *Spokane Merchants' Association v. Parry* 204
- 5. **MORTGAGES—FORECLOSURE—TRUST MORTGAGE—ACCOUNTING.** Failure of the trustee to account for certain accounts and bills receivable will not prevent the trustee from foreclosing a mortgage given in trust for creditors, where enough appears to show the necessity for foreclosure; since he must fully account later for all receipts. *Spokane Merchants' Association v. Parry* 204
- 6. **MORTGAGES—FORECLOSURE—STAY—STATUTES.** Rem. & Bal. Code, § 1126, providing for a stay of the foreclosure of a mortgage upon which there shall be due any interest or installment of the principal and there are other installments not due, if tender of sums due and

MORTGAGES—CONTINUED.

costs are paid, does not apply where, by reason of default or breach, the mortgagor has declared the whole principal sum due, in accordance with the provisions of the mortgage; since such provisions are valid and must be given force, and consequently no other installments are *not due*. *Knisell v. Brunet* 610

MOTIONS:

To open or set aside default judgment, see **JUDGMENT**, 4.

For dismissal or nonsuit on trial, see **TRIAL**, 2.

MUNICIPAL CORPORATIONS:

Liability for death from defective lighting system, see **ELECTRICITY**.
Condemnation of abutter's interest in street, see **EMINENT DOMAIN**, 3-5.

Jurisdiction and venue of justice of peace for violation of town ordinance, see **JUSTICES OF THE PEACE**.

Removal of right of city to plead statute against moral claim, see **LIMITATION OF ACTIONS**.

Forfeiture of railroad franchise, see **RAILROADS**, 1.

Street railroads in general, see **STREET RAILROADS**.

Extent of franchise of street railway company, see **STREET RAILROADS**, 1.

1. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—ENGINEER'S CERTIFICATES—CONCLUSIVENESS—BAD FAITH—EVIDENCE—SUFFICIENCY.** Estimates of a city engineer, who was made the final arbitrator in a contract, are conclusive, in the absence of fraud or mistake; and are not shown to be made in bad faith by evidence that measurements of another engineer tended to show rather more excavation than had been allowed, and that a concrete walk was in places thicker than necessary to secure a uniform thickness of four inches, the city engineer having exercised his best judgment. *McKivor v. Savage* 135
2. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—ESTIMATES—CONSTRUCTION.** Where a contract requires the yardage of sand and gravel used in street work to be determined by the cubic yards in the pavement as shown by plans and specifications, the proper method of measurement is the cubic yardage of the completed work, and not the separate yardage before the materials are mixed. *McKivor v. Savage* 135
3. **MUNICIPAL CORPORATIONS—CONTRACTS—BIDS—DISCRETION—DECLARATION OF EMERGENCY.** Where a city charter provides that if a city council shall "declare an emergency to exist," competitive bids for the letting of a contract may be dispensed with, the declaration of an emergency is a matter of legislative discretion which cannot be controlled or inquired into by the courts. *Stern v. Spokane*.. 325

MUNICIPAL CORPORATIONS—CONTINUED.

4. SAME—REJECTION OF BIDS—AWARD—DISCRETION. Where a charter provision requires a city council, before letting a contract, to advertise for competitive bids "reserving the right to reject any and all bids," a discretion is reposed in the council to let the contract to one it considers the "best" bidder; and in the absence of fraud or measurable pecuniary loss to the city showing a manifest abuse of discretion, the courts will not interfere with the rejection of the lowest bid, and an award to a higher bid, on pumping machinery requiring a specified proficiency, a technical and scientific knowledge being necessary to determine between the different manufactures offered. *Stern v. Spokane* 325
5. MUNICIPAL CORPORATIONS—CONTRACTS—BONDS ON PUBLIC WORK—MATERIALMEN—MECHANICS' LIENS. Rem. & Bal. Code, § 1133, requiring the mailing of duplicate statements to the owner of property, is part of the mechanics' lien law, and has no application to bonds required of contractors on public work to secure laborers and materialmen employed on the work, under Id., § 1159. *Gate City Lumber Co. v. Montesano* 586
6. SAME—CONTRACTOR'S BOND—LIABILITY OF CITY—NOTICE. Where a city failed to require a contractor to enter into a bond for the performance of public work and the payment of debts incurred, as required by Rem. & Bal. Code, § 1159, the city's liability therefor is absolute; and the requirement of § 1161 for notice being for the protection of sureties has no application. *Gate City Lumber Co. v. Montesano* 586
7. SAME—CONTRACTOR'S BOND—MATERIALMEN AND JUST DEBTS—WHAT CONSTITUTES—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 1159, requiring a city to take a bond from contractors on public work for the security of "materialmen" and "just debts incurred in the performance of the work," a lumber company does not bring itself within the terms of the statute by loading lumber on the cars at a distance and billing it to the contractor, where part of the lumber was diverted to other places from the cars and not used in the work nor delivered on the ground for use. *Gate City Lumber Co. v. Montesano* 586
8. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—REFUNDS—RECOVERY—STATUTES—RETROACTIVE LAW. Rem. & Bal. Code, § 7892, providing that any funds in the treasury of a city belonging to the fund of a local improvement district after the payment of the whole cost thereof, shall on demand be repaid to the payors of the fund in cases where the assessment roll had theretofore been filed as well as in cases where it had not been filed at the time of the passage of the act, was intended to be retroactive, and removes the bar of the statute of limitations for the recovery thereof, where the same was passed at the next session of the legislature after a decision of the supreme court upholding the two-year statute of limitations from

MUNICIPAL CORPORATIONS—CONTINUED.

the delinquency of the assessment as a reasonable one, the city having no moral right to the money, and the ascertainment of the amount often being postponed beyond the two-year period. *State ex rel. McCullough v. Seattle* 241

9. MUNICIPAL CORPORATIONS—STREETS—PEDESTRIANS—CONTRIBUTORY NEGLIGENCE. A pedestrian crossing on a dark night a street which he knows was closed to travel and which was properly barricaded, giving no heed to numerous barriers which were a plain warning of the dangers, is guilty of gross contributory negligence, and cannot recover for injuries sustained in falling over a barrier. *Hunter v. Montesano* 489

MUTUAL INSURANCE:

See INSURANCE, 9-11.

MUTUALITY:

Contract of lease, see LANDLORD AND TENANT, 2.

NAMES:

Of candidate on election ballot, see ELECTIONS, 1-4.

NAVIGABLE WATERS:

Letting contract for county bridge over navigable stream, see BRIDGES.

Right of boom company to obstruct river, see LOGS AND LOGGING, 2.

1. NAVIGABLE WATERS—FLOTABLE STREAM—LOGS AND LOGGING. A stream is navigable for the floatage of timber products, where during natural freshets occurring in the winter, spring, and fall, for varying periods of from one day to several days, it is floatable for saw logs, and is used at all times for floating shingle bolts; and the fact that use of the shores and improvements will add materially to the convenience does not affect the question of its navigability. *State ex rel. United Tanners Timber Co. v. Superior Court* 193
2. SAME—SHORE RIGHTS—DRIVING LOGS. Shore rights required to facilitate the driving of logs must be acquired by private treaty or condemnation. *State ex rel. United Tanners Timber Co. v. Superior Court* 193

NECESSITY:

For notice of acceptance of guaranty, see GUARANTY, 2.

Delivery or mailing to owner of duplicate statement of material furnished, see MECHANICS' LIENS, 1.

Corroboration of prosecutrix, see RAPE.

For findings in equity case, see TRIAL, 6.

Tender of purchase money due in action for breach of contract to convey, see VENDOR AND PURCHASER, 8.

NEGLIGENCE:

- See **ELECTRICITY**.
 - Of carrier as to passenger, see **CARRIERS**, 1, 2.
 - Damages in general, see **DAMAGES**.
 - Acts and statements accompanying or connected with transaction as constituting part of *res gestae*, see **EVIDENCE**, 1, 2.
 - Injuries caused by runaway team, see **HIGHWAYS**.
 - Demised premises, see **LANDLORD AND TENANT**, 5.
 - Of employers, see **MASTER AND SERVANT**.
 - Contributory negligence of servant, see **MASTER AND SERVANT**, 15-20.
 - Risks assumed by servant, see **MASTER AND SERVANT**, 10-14.
 - Liability of cities for torts, see **MUNICIPAL CORPORATIONS**, 9.
 - Of person injured by defects or obstructions in street, see **MUNICIPAL CORPORATIONS**, 9.
 - Accidents at railroad crossing, see **RAILROADS**, 2-4.
 - Of person injured at railroad crossing, see **RAILROADS**, 4.
 - Of person injured by street car, see **STREET RAILROADS**, 8-10, 12.
 - Precautions as to children on street railway tracks, see **STREET RAILROADS**, 6, 11.
 - In operation of street railroads, see **STREET RAILROADS**, 4-12.
 - Nonsuit on ground of contributory negligence, see **TRIAL**, 3.
1. **NEGLIGENCE—INSUFFICIENT STRUCTURE—CONTRACTORS—LIABILITY TO PUBLIC.** A contractor, constructing a balcony railing without plans and specifications therefor, which the contract gave him the right to demand, is not therefore liable for an insufficiency in the railing, where the work was done upon consultation with, and under the direction of, the architect, and the architect testified that the building was completed in every respect according to the specifications. *Thornton v. Dow* 622
 2. **NEGLIGENCE—INSUFFICIENT STRUCTURES—LIABILITY OF CONTRACTOR—ACCEPTANCE BY OWNER.** Technical omissions in the acceptance of a state armory from the contractor will not render the contractor liable for an injury to a spectator in the building, on the ground of illegality in the manner of acceptance, where the building had been passed upon and received by the proper official and was in the possession of the state, and was leased for a public entertainment, the injured party being present at the invitation of the state or its lessee. *Thornton v. Dow* 622
 3. **SAME—ACCEPTANCE BY OWNER—NUISANCE.** A contractor is not liable as for a nuisance for insufficiency in a balcony rail, where he has lived up to the "law of the building," and has not been guilty of negligence, and the building has been accepted and taken over by the owner for use. *Thornton v. Dow* 622
 4. **NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.** In an action for the destruction of an automobile at a railroad crossing, the plaintiff is entitled, on the question of his contributory negligence, to have his

NEGLIGENCE—CONTINUED.

conduct judged by the circumstances surrounding him at the time, and compared to that of a reasonably prudent man. *Hull v. Seattle, Renton & Southern R. Co.* 162

5. NEGLIGENCE—PRESUMPTIONS—RES IPSA LOQUITUR—INSTRUCTIONS—BURDEN OF PROOF. Where the doctrine of *res ipsa loquitur* casts the burden of proof upon a city to overcome the presumption of negligence from the electrocution of a consumer while turning on an electric light in his residence, it is not prejudicial error to instruct the jury that the fact of the accident casts the burden upon the city to show by a fair preponderance of the testimony that it was not guilty of negligence, *Abrams v. Seattle* 356

NEGOTIABLE INSTRUMENTS:

Pleading in action on notes, see PLEADING, 1.

NEWLY DISCOVERED EVIDENCE:

See NEW TRIAL, 2.

NEWSPAPERS:

Service of process by publication, see PROCESS.

NEW TRIAL:

Scope of hearing on motion after remand by appellate court, see APPEAL AND ERROR, 30.

Decision on appeal as law of the case on new trial, see APPEAL AND ERROR, 29.

1. NEW TRIAL—GROUNDS—CONFLICTING EVIDENCE. Refusal to grant a new trial because the verdict was contrary to the evidence, is not error where the evidence was conflicting. *In re Westlake Avenue* 549
2. NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial will not be granted for newly discovered evidence that is almost wholly cumulative and would not change the result. *In re Wells* 518

NOMINATION:

Contest over nomination of candidates for legislature, see STATES.

NONSUIT:

See DISMISSAL AND NONSUIT.

On trial, see TRIAL, 2, 3.

NONSUPPORT:

Of wife by husband, see HUSBAND AND WIFE, 5.

NOTICE:

- Of appeal, see **APPEAL AND ERROR**, 11, 12.
- Of acceptance of guaranty, see **GUARANTY**.
- To mortgagee of nonpayment of premium, see **INSURANCE**, 3.
- To open or vacate judgment by default, see **JUDGMENT**, 8.
- Application to vacate judgment, see **JUDGMENT**, 5.
- Notice of pendency of action, see **LIS PENDENS**.
- Duplicate statement to owner of material furnished, see **MECHANICS' LIENS**, 1.
- As affecting liability of city on failure to require contractor's bond on public work, see **MUNICIPAL CORPORATIONS**, 6.
- Affecting *bona fides* of purchaser of land, see **VENDOR AND PURCHASER**, 5-7.

NUISANCE:

- Liability of contractor as for nuisance for insufficiency in balcony railing, see **NEGLIGENCE**, 3.
- Construction of findings as to nuisance, see **TRIAL**, 7.
- 1. **NUISANCES—DEFINITIONS.** The general definition of "nuisance" is comprehensive enough to include almost all wrongs interfering in any way with personal rights of every kind. *Thornton v. Dow*. 622
- 2. **NUISANCES—CLASSIFICATION—BUILDING.** An insufficient balcony rail in a public building does not belong to the class of nuisances embraced within things of a noxious or dangerous kind or dangerous within itself. *Thornton v. Dow* 622
- 3. **NUISANCE—INSUFFICIENT STRUCTURE—LIABILITY OF CONTRACTOR TO PUBLIC—CAUSAL CONNECTION.** There is no causal connection between a spectator at a public entertainment, injured by the giving way of a balcony rail, and the contractor who constructed the railing, which could render the contractor liable for the creation of a nuisance; especially where the contractor was free from negligence and constructed the rail according to plans and specifications. *Thornton v. Dow* 622

OBJECTIONS:

- Review as dependent on objection or exception made on trial, see **APPEAL AND ERROR**, 6-8.
- Motion to dismiss as dependent on objection to bond in lower court, see **APPEAL AND ERROR**, 10.
- Effect of technical objection to form of judgment, see **JUDGMENT**, 6.

OBSTRUCTIONS:

- Of river by boom company, see **LOGS AND LOGGING**, 2.

OFFICERS:

- Corporate officers, see **CORPORATIONS**, 4.
- Effect of failure to file list of, see **CORPORATIONS**, 3.
- County board, see **COUNTIES**.

OFFICERS—CONTINUED.

Of benefit society as agent, see **INSURANCE**, 11.

Justices of the peace, see **JUSTICES OF THE PEACE**.

Mandamus, see **MANDAMUS**.

Enjoining state land commissioner from issuing certificates on contracts for filling tide lands, see **PUBLIC LANDS**, 2.

OPENING:

Judgment, see **JUDGMENT**, 1-5, 7-9, 12, 14.

OPINIONS:

Fraudulent representations as to matters of fact or of opinions, see **FRAUD**, 3.

ORAL AGREEMENTS:

See **FRAUDS**, **STATUTE OF**.

ORAL EVIDENCE:

See **EVIDENCE**, 6-8.

ORDER OF PROOF:

In civil actions, see **TRIAL**, 1.

ORDERS:

Review of appealable orders, see **APPEAL AND ERROR**, 1, 2.

Of railroad commission, see **RAILROADS**, 5-14.

ORDINANCES:

Jurisdiction and venue in prosecution for violation of town ordinance, see **JUSTICES OF THE PEACE**.

Extent of ordinance relating to fares and transfers, see **STREET RAILROADS**, 1-3.

ORPHANS:

Adoption, see **ADOPTION**.

OWNERSHIP:

Giving mortgage as breach of condition against change of ownership, see **INSURANCE**, 2.

PARENT AND CHILD:

Adoption of children, see **ADOPTION**.

Actions for wrongful death of child, see **DEATH**, 1, 3.

Descent of property, see **DESCENT AND DISTRIBUTION**.

Guardianship of minor, see **GUARDIAN AND WARD**.

Contributory negligence of parent in action for death of child, see **STREET RAILROADS**, 10.

PAROL AGREEMENTS:

Effect and requirements of statute of frauds, see **FRAUDS**, **STATUTE OF**.

PAROL EVIDENCE:

See EVIDENCE, 6-8.

Establishment of trust, see TRUSTS, 2.

PARTIES:

Survival of action and substitution of parties plaintiff, see ABATEMENT AND REVIVAL.

Persons entitled to appeal, see APPEAL AND ERROR, 3-5.

On appeal or writ of error, see APPEAL AND ERROR, 11.

Entitled to allege error, see APPEAL AND ERROR, 16-18, 27.

On bonds, see BONDS.

Rights and liabilities as to costs, see COSTS.

Admissions as evidence, see EVIDENCE, 3, 4.

Suit for injunction, see INJUNCTION.

PARTITION:

Right of cotenants, see TENANCY IN COMMON, 2.

Of property to owners under trust agreement, see TRUSTS, 3.

PARTNERSHIP:

1. PARTNERSHIP—REPRESENTATION—DEED OF REAL ESTATE. One partner alone cannot deed partnership real estate. *Burr v. Dyer*.. 603

PART PERFORMANCE:

To satisfy statute of frauds, see FRAUDS, STATUTE OF, 3.

PARTY WALLS:

Lis pendens in mortgage foreclosure as affecting prior party wall lien, see LIS PENDENS, 1.

PATENTS:

For public lands, see PUBLIC LANDS, 1.

PAYMENT:

Validity of law providing for payment of hotel inspection fee, see CONSTITUTIONAL LAW, 1, 2.

Of judgment and right to contribution, see CONTRIBUTION.

Claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS.

As part performance to satisfy statute of frauds, see FRAUDS, STATUTE OF, 3.

Nonpayment of insurance premium, see INSURANCE, 3.

Necessity of tendering payment due in action for breach of contract to convey, see VENDOR AND PURCHASER, 8.

Recovery of price paid for land, see VENDOR AND PURCHASER, 1, 2, 9.

PENDENCY OF ACTIONS:

Effect as to property involved, see LIS PENDENS.

PERFORMANCE:

Waiver of by vendor, see **VENDOR AND PURCHASER**, 4.

PERSONAL INJURIES:

See **ASSAULT AND BATTERY**; **NEGLIGENCE**.

Survival of action and substitution of parties, see **ABATEMENT AND REVIVAL**.

To passenger, see **CARRIERS**, 1, 2.

Inadequate and excessive damages, see **DAMAGES**, 1-4.

Action for death from, see **DEATH**, 1, 2.

Admissibility of evidence as *res gestae* in action for injuries, see **EVIDENCE**, 1, 2.

Injuries caused by runaway team, see **HIGHWAYS**.

From defective condition of demised premises, see **LANDLORD AND TENANT**, 5.

To employee, see **MASTER AND SERVANT**.

From defects or obstructions in street or public place, see **MUNICIPAL CORPORATIONS**, 9.

To traveler on highway crossing railroad, see **RAILROADS**, 2-4.

To persons on or near street railroad tracks, see **STREET RAILROADS**, 4-12.

Taking case from jury on ground of contributory negligence, see **TRIAL**, 3.

PERSONAL LIBERTY:

Constitutional guaranties, see **CONSTITUTIONAL LAW**, 2.

PLATS:

Discretion of trustees under agreement to vacate, replat and distribute to grantors, see **TRUSTS**, 3.

PLEA:

In civil actions, see **PLEADING**.

PLEADING:

In actions on accounts, see **ACCOUNT**.

Commencement of actions, see **ACTION**, 2, 3.

Presumption as to amendment, see **APPEAL AND ERROR**, 19.

Stipulation allowing amendment as constituting general appearance, see **APPEARANCE**.

In action for injuries to passengers, see **CARRIERS**, 2.

Effect of amendment on admissibility of deposition, see **DEPOSITIONS**.

In action of ejectment, see **EJECTMENT**.

Estoppel by allegation in pleadings, see **ESTOPPEL**, 1.

Necessity for pleading estoppel, see **ESTOPPEL**, 2.

Admissibility of answer struck out as admission to prove facts stated, see **EVIDENCE**, 3.

In actions for fraud, see **FRAUD**, 7.

PLEADING—CONTINUED.

Issues and proof under general denial in action for injuries caused by runaway team, see **HIGHWAYS**.

Indictment or criminal information or complaint, see **INDICTMENT AND INFORMATION**.

Conclusiveness of judgment on demurrer, see **JUDGMENT**, 12.

In mandamus proceedings, see **MANDAMUS**.

For injuries to servant, see **MASTER AND SERVANT**, 13, 21, 22.

In action to quiet title, see **QUIETING TITLE**.

In action by owner to set aside tax proceedings, see **TAXATION**, 7.

1. **PLEADING—COMPLAINT—SUFFICIENCY—NEGOTIABLE INSTRUMENTS—FRAUDULENT CONVEYANCES.** A complaint against a corporation and its receiver fails to set forth any cause of action against the defendants, where it merely sets up a promissory note given by the promoter of the corporation in payment for machinery, and alleges that the corporation and the promoter were one and the same person, the incorporation of the former being illegal, and that the assets of the corporation were the assets of the promoter, who was undertaking to cheat and defraud the plaintiff; it not being alleged that the defendants owed the plaintiff anything or had attempted to defraud the plaintiff. *Peterson v. Puget Sound Biscuit Co.* . . 451
2. **PLEADING—DEFENSES—CONTRIBUTORY NEGLIGENCE—INCONSISTENCY.** The plea of plaintiff's contributory negligence is not necessarily inconsistent with a general denial of defendant's negligence. *Kimble v. Stackpole* 35
3. **PLEADING—ANSWERS—DENIALS.** An answer admitting the receipt of a notice of demand against a city, as set up in one paragraph of the complaint, and denying all the allegations of another paragraph alleging a demand, is not sufficient to put the fact of notice and demand in issue. *Franstoli v. Tacoma* 463

PLEDGES:

See **CHATTEL MORTGAGES**.

POLICE JUSTICES:

Change of venue to justice of peace in prosecution for violation of town ordinance, see **JUSTICES OF THE PEACE**.

POLICE POWER:

Eliminating intent in defining crime as exercise of police power, see **CRIMINAL LAW**, 3.

Ordinance requiring fenders on street cars, see **STREET RAILROADS**, 4.

POLICY:

Of insurance, see **INSURANCE**.

POLITICAL RIGHTS:

Suffrage, see **ELECTIONS**.

POSSESSION:

See ADVERSE POSSESSION.

PRACTICE:

See APPEAL AND ERROR; APPEARANCE; COSTS; CRIMINAL LAW; DEPOSITIONS; JUDGMENT; NEW TRIAL; PLEADING; TRIAL.

Prosecution of actions in general, see ACTION.

PREFERENCES:

Right to purchase tide or shore lands, see PUBLIC LANDS, 3, 4; REFORMATION OF INSTRUMENTS.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 25-28.

PREMIUMS:

Necessity of notice before forfeiture of policy for nonpayment of premium, see INSURANCE, 3.

PRESUMPTIONS:

On appeal, see APPEAL AND ERROR, 20.

Negligence causing wrongful death, see ELECTRICITY, 1.

On granting default, see JUDGMENT, 1.

Of negligence from death by contact with electric light, see NEGLIGENCE, 5.

PRIMARY ELECTIONS:

See ELECTIONS.

PRINCIPAL AND AGENT:

Representation of corporation by agent, see CORPORATIONS, 4.

Authority to waive proof of loss, see INSURANCE, 6.

Local secretary as agent of benefit society, see INSURANCE, 11.

Evidence of relation in action to recover earnest money paid through fraud of agent, see VENDOR AND PURCHASER, 1.

1. PRINCIPAL AND AGENT—EXISTENCE OF RELATION—EVIDENCE OF AGENT. The declarations of an agent as to whom he represented are competent where they form part of his testimony in the case. *Singer v. Guy Investment Co.* 674

PRINCIPAL AND SURETY:

See BONDS; INDEMNITY.

Jurisdiction to enter judgment against nonappearing sureties on bond in action to foreclose maritime lien, see ACTION, 4.

Sufficiency and competency of sureties on appeal bonds, see APPEAL AND ERROR, 9, 10.

Collateral promises, see GUARANTY.

Right to offset support of ward against liability on guardian's bond, see GUARDIAN AND WARD, 2.

Contractor's bond on public work, see MUNICIPAL CORPORATIONS, 5-7.

PRIORITIES:

Of mortgages, see CHATTEL MORTGAGES.

Effect of *lis pendens* on prior party wall lien, see LIS PENDENS, 1.

PROCESS:

Commencement of actions, see ACTION, 2, 3.

On appeal, see APPEAL AND ERROR, 11, 12.

Presumption on appeal or writ of error, see APPEAL AND ERROR, 20.

Corporations in general, see CORPORATIONS, 3.

Service of citation in election contest, see ELECTIONS, 5.

To sustain judgment, see JUDGMENT, 4, 7-9.

1. PROCESS—SUMMONS FOR PUBLICATION—SUFFICIENCY. A summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default. *Worthington v. La Violette*..... 525

2. SAME—JUDGMENT—SERVICE OF PROCESS—EVIDENCE. In an action to set aside a default judgment in a tax foreclosure, a finding that there was no summons other than a defective publication shown by the files is warranted where the defendants in the foreclosure were not personally served, the files show no other service than the defective publication, and there was no affirmative showing that any other service was made. *Worthington v. La Violette*..... 525

PROMOTERS:

Fraud of, see CORPORATIONS, 5, 6.

PROOF:

Of loss insured against, see INSURANCE, 5, 6.

Of death of insured, see INSURANCE, 7, 8.

PROPERTY:

Taking for public use, see EMINENT DOMAIN.

Taxation of, see TAXATION.

PUBLICATION:

Service of process, see PROCESS.

PUBLIC IMPROVEMENTS:

By counties, see COUNTIES.

PUBLIC LANDS:

Preference right to lease harbor area as interest subject to condemnation, see EMINENT DOMAIN, 1.

Injunction to protect rights in, see INJUNCTION.

Reforming state deed to tide lands, see REFORMATION OF INSTRUMENTS.

1. PUBLIC LANDS — HOMESTEAD — HUSBAND AND WIFE — COMMUNITY PROPERTY. A homestead upon which final proof was made before the death of the homesteader's wife, is community property, although patent was issued to the husband after the wife's death. *Eckert v. Schmitt*..... 23

PUBLIC LANDS—CONTINUED.

2. PUBLIC LANDS—TIDE LANDS—FILLS—CERTIFICATES — CONTRACT — INJUNCTION. Under Rem. & Bal. Code, § 8103, providing that the commissioner of public lands shall issue certificates on contracts for the filling of tide lands showing the actual cost of the fill, which certificates shall when filed be a lien upon the lands for cost specified in the certificate, with fifteen per cent additional, with the proviso that the lien shall not be operative for an amount exceeding the cost of the work as stated in the contract, and § 8107, providing that the cost of bulkheads shall be apportioned by the commissioner to all lands benefited thereby in addition to the cost of the fill, and under a contract for filling tide lands which provides that the entire cost of the work "including the cost of the bulkheads" shall not exceed sixteen cents per cubic yard for each and every yard of earth put upon each tract of land, the lands are liable only for the maximum of sixteen cents per cubic yard fixed by the contract, except where additional costs of bulkheads are approved by the governor, pursuant to a clause in the contract; and where the commissioner is threatening to issue certificates in excessive amounts to include distributed street and alley fill and additional bulkheads without the governor's approval, injunction will issue to restrain such action. *Russell v. Ross*..... 344
3. PUBLIC LANDS—SHORE LANDS—PREFERENCE RIGHT TO PURCHASE—VALUABLE IMPROVEMENTS. The owner of a foundry is not entitled to a preference right to purchase shore lands as the owner of "valuable improvements" prior to March 26th, 1890, pursuant to Rem. & Bal. Code, §§ 6750, 6754, by reason of the erection of an "office building" constructed by one man in two or three days, and a coke shed of the capacity of one-half ton, the latter probably erected after March 26th, and the former at some indefinite time after December 24th, 1889, the value of the buildings not being shown; especially in view of the fact that the state had asserted its title to all tide lands November 11, 1889. *Pacific Iron Works v. Bryant Lumber & Shingle Mill Co*..... 502
4. PUBLIC LANDS—SHORE LANDS—PREFERENCE RIGHT TO PURCHASE—RIGHTS OF ABUTTERS—CONVEYANCE OF EASEMENT. The grant of an easement for a railway right of way along a shore line extending to or below high water mark does not convey or affect the grantor's preference right to purchase shore lands from the state as the owner of abutting uplands, under Rem. & Bal. Code, §§ 6750, 6754. *Pacific Iron Works v. Bryant Lumber & Shingle Mill Co*..... 502

PUBLIC POLICY:

Indemnifying sureties on bail bond, see INDEMNITY, 2.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

Estoppel to deny need of land for public use, see STIPULATIONS.

PUNISHMENT:

For criminal offenses in general, see **CRIMINAL LAW**, 7.
Of criminal insane, see **INSANE PERSONS**.

QUASHING:

Writ of certiorari, see **CERTIORARI**.

QUESTION FOR JURY:

Negligence in setting down passengers, see **CARRIERS**, 1.
Insanity at time of commission of act as question of fact, see **INSANE PERSONS**.
Death of insured, see **INSURANCE**, 8.
In action for injuries to servant, see **MASTER AND SERVANT**, 5, 18, 26.
Negligence of driver of automobile stalled on crossing, see **RAILROADS**, 4.
Negligence in running down automobile stalled on crossing, see **RAILROADS**, 3.
Compliance with regulation requiring fenders on street cars, see **STREET RAILROADS**, 5.
In civil actions in general, see **TRIAL**, 3.

QUIETING TITLE:

Dismissal of action as quieting title, see **CANCELLATION OF INSTRUMENTS**, 2.
1. **QUIETING TITLE—TITLE OF PLAINTIFF—PLEADING—EVIDENCE OF TITLE—SUFFICIENCY.** In an action to quiet title, the plaintiff's title is sufficiently shown by a warranty deed, without having deraigned her title, where the defendants claimed under a common source through a void tax foreclosure, naming the plaintiff as owner, and the validity of the plaintiff's deed was not disputed, in view of Rem. & Bal. Code, § 8747, providing that a warranty deed shall be deemed and held a conveyance in fee simple. *Darrin v. Humes*..... 537

RAILROAD COMMISSION:

See **RAILROADS**, 5-14.
Supersedeas bond on appeal from lower court's review of orders of railroad commission, see **CARRIERS**, 3.

RAILROADS:

Carriage of goods and passengers, see **CARRIERS**.
Grant of right of way as easement, see **DEEDS**, 2.
Condemning use of city street, see **EMINENT DOMAIN**, 1, 3-5.
Injuries to employees, see **MASTER AND SERVANT**, 2, 15, 16, 23, 24.
Contributory negligence of plaintiff in action for destruction of automobile at crossing, see **NEGLIGENCE**, 4.
Injuries to persons or property on or near street railway tracks, see **STREET RAILROADS**, 4-12.

RAILROADS—CONTINUED.

1. RAILROADS—FRANCHISES—FORFEITURE—MUNICIPAL CORPORATIONS—ORDINANCES. A railroad franchise in city street, granted by ordinance, may be forfeited by a resolution of the city council, in the absence of statutory or charter provisions requiring the forfeiture to be by ordinance. *State ex rel. Sylvester v. Superior Court*... 279
2. RAILROADS—CROSSINGS—DUTY TO STOP, LOOK AND LISTEN. The driver of an automobile, whose machine became stalled on a railroad crossing, owed no absolute duty to stop, look, and listen before driving on the track, if he could ascertain that he could cross in safety by looking and listening. *Hull v. Seattle, Renton & Southern R. Co.* 162
3. SAME—NEGLIGENCE—QUESTION FOR JURY. The negligence of a railroad company is for the jury, where it appears that its electric motor and train ran down an automobile, stalled on a crossing, that the machine could have been seen for a distance of over 400 feet, and the train stopped within 160 feet, but the motorman was not at the motor and did not get there until within 60 feet of the crossing. *Hull v. Seattle, Renton & Southern R. Co.*..... 162
4. SAME—CONTRIBUTORY NEGLIGENCE—AUTOMOBILES. The contributory negligence of the driver of an automobile, stalled on a railroad crossing by its engine going dead, is for the jury, where he testified that he was unable to stop the automobile before reaching the track, and expected its momentum would carry it across, and the men in the car, who failed to push the car off, immediately started to flag the train and were not subject to his control. *Hull v. Seattle, Renton & Southern R. Co.*..... 162
5. RAILROADS—COMMISSION—ORDERS—RIGHT TO APPEAL—STATUTES. The provision in the railway commission law (Rem. & Bal. Code, § 8629), giving to railway companies the right of appeal from orders of the superior court on reviewing orders of the railroad commission, was not intended to restrict the right of appeal to railroad companies, in view of Const., art. 4, § 4, giving the supreme court appellate jurisdiction in all civil cases, and Rem. & Bal. Code, § 1716, providing that any party aggrieved may appeal from the final judgment in any action or proceeding. *State ex rel. Great Northern R. Co. v. Railroad Commission*..... 218
6. SAME—PARTY AGGRIEVED. The railroad commission has such an interest in defending its orders concerning railroad service and facilities, made in proceedings instituted by it, as to entitle it to appeal to the supreme court from orders of the superior court reversing the orders of the commission, under Rem. & Bal. Code, § 1716, giving the right of appeal to any party aggrieved by the final order in any action or proceeding. *State ex rel. Great Northern R. Co. v. Railroad Commission* 218

RAILROADS—CONTINUED.

7. SAME—ORDERS—RAILWAY SERVICE—REASONABLENESS—REVIEW. Orders of the railroad commission respecting railroad service and facilities will not be set aside on appeal as unreasonable, unless they clearly so appear, the presumptions being that they are reasonable. *State ex rel. Great Northern R. Co. v. Railroad Commission*.... 218
8. SAME—ORDERS—EXTENSION OF SPUR TRACKS. An order of the railroad commission requiring the extension of a spur track so as to permit teams to load and unload cars at all points of the extension, is not unreasonable, where it appears that there is such a necessity for team facilities to avoid inconvenience and delay; and it is not unreasonable in that it directs the particular manner in which the service shall be furnished, where the railroad company failed to show that the service could be furnished in some other manner less burdensome to it. *State ex rel. Great Northern R. Co. v. Railroad Commission* 218
9. SAME—TRAIN SERVICE. An order of the railroad commission requiring an additional train from Anacortes to Burlington and return, to connect with the noon trains on the main line, is not unreasonable, in the absence of proof that its operation would result in a loss, where it appears that Anacortes is a city of five or six thousand inhabitants at the western terminus of a branch line, sixteen miles from the main line, doing a freight business of \$20,000 per month, and \$800 for passenger fares, the present service furnishing only a morning mail service and no close connection with the noon train in both directions on the main coast line. *State ex rel. Great Northern R. Co. v. Railroad Commission* 218
10. SAME—STATION FACILITIES—RECORD—REVIEW. An order of the railroad commission requiring a railroad to furnish modern flush toilets at a depot waiting room in a town of 2,000 inhabitants is unreasonable, where there was no proof as to the inadequacy of existing facilities; and the same cannot be sustained on the theory that the commission found it necessary on "a view of the premises," since the law contemplates that all the evidence be preserved in the record for the purposes of review. *State ex rel. Great Northern R. Co. v. Railroad Commission* 218
11. SAME—LOCATION OF DEPOT. An order of the railroad commission requiring a railroad depot to be moved five hundred feet, in a town of seventy-five people, is unreasonable, where the only reason therefor was to bring the depot to the point on the railroad nearest the business center of the town. *State ex rel. Great Northern R. Co. v. Railroad Commission* 218
12. SAME—TRAIN SERVICE. An order of the railroad commission requiring a railroad to stop one of its passenger trains on flag at a town of seventy-five people, one and one-half miles from another town of the same size, where its trains stop, is not unreasonable,

RAILROADS—CONTINUED.

where there is a siding at such place, doing a freight business of \$2,738 in a year, a sawmill and a paint mill. *State ex rel. Great Northern R. Co. v. Railroad Commission*..... 218

13. **SAME.** Orders of the railroad commission requiring a railroad to stop trains on flag at towns of 250 inhabitants, which were business centers of considerable importance, are not unreasonable, where such service would enable residents to visit their county seat and transact business and return the same day. *State ex rel. Great Northern R. Co. v. Railroad Commission*..... 218
14. **SAME—STATION FACILITIES.** Orders of the railroad commission requiring a railroad to furnish running water for drinking purposes at its stations in small towns is unreasonable, in the absence of any evidence showing delinquency on the part of the company in the present service. *State ex rel. Great Northern R. Co. v. Railroad Commission* 218

RAPE:

Conviction of lesser degree assault under charge of assault to commit felony, see **INDICTMENT AND INFORMATION**.

1. **RAPE—CORROBORATION OF PROSECUTRIX—NECESSITY.** Under Rem. & Bal. Code, § 2443, providing that no conviction of rape shall be had upon the testimony of the prosecutrix unless supported by other evidence, it is error to refuse to instruct the jury that no conviction can be had upon the uncorroborated testimony of the prosecutrix, when she was contradicted by other witnesses. *State v. Crouch*. 450

RATE:

Assessment of property, see **TAXATION**, 1-4.

REAL PROPERTY:

Conveyance, see **DEEDS; VENDOR AND PURCHASER**.

Adverse possession, see **ADVERSE POSSESSION**.

Effect of statute of frauds on agreement relating to real property, see **FRAUDS, STATUTE OF**, 2, 3.

Deed of by one partner, see **PARTNERSHIP**.

Trespass on real property, see **TRESPASS**.

REBUTTAL:

Evidence, see **TRIAL**, 1.

RECALL:

Of deeds by change in custody, see **WILLS**, 2.

RECEIVERS:

Of corporations in general, see **CORPORATIONS**, 6.

RECORDS:

- Conclusiveness on appeal as against affidavits to show cessation of controversy, see **APPEAL AND ERROR**, 5.
- Transcript on appeal or writ of error, see **APPEAL AND ERROR**, 14, 15.
- Conclusiveness of formal signed judgment, see **JUDGMENT**, 11.
- As notice affecting *bona fides* of purchase of land, see **VENDOR AND PURCHASER**, 6, 7.

REDEMPTION:

- From mortgage foreclosure, see **MORTGAGES**, 3.
- Purchase by mortgagee to prevent, see **TAXATION**, 5.
- Of property by cotenant, see **TENANCY IN COMMON**.

REFORMATION OF INSTRUMENTS:

1. **REFORMATION OF INSTRUMENTS—MISTAKE—RIGHT OF GRANTEEES—ESTOPPEL—HIGHWAYS—PUBLIC LANDS—STATE DEED.** In an action to reform a state deed for mistake in including a state aid road, established and partly built upon state tide lands, upland owners who subsequently applied to purchase the tide lands cannot take advantage, nor claim ignorance, of a mistake of the commissioner of public lands in executing the deed for the tide lands before receiving a waiver from the grantees as to the strip of land upon which the road was being built, such waiver having been demanded of them. *Aberdeen v. Wiley*..... 434
2. **SAME—DEFENSES—ESTOPPEL—CONSTITUTIONALITY OF LAW—PUBLIC LANDS—TIDE LANDS—PREFERENCE RIGHT TO PURCHASE.** The purchaser of state tide lands, applying for the same after a state aid road was established and partly constructed across the lands, cannot assert the unconstitutionality of the law establishing the state aid road and authorizing its construction, in an action to reform the state deed so as to except the road from the deed; the preference right to purchase not being a vested right, but a mere gratuity. *Aberdeen v. Wiley*..... 434
3. **SAME—DEFENSES—DOCTRINE OF STATUS QUO.** In an action to reform a state deed of tide lands by excepting a state aid road through the property, the doctrine of *status quo* has no application where the grantees knew, at the time the deed was given and the purchase price paid, that the state did not intend to include the roadway in the conveyance. *Aberdeen v. Wiley*..... 434

REFUND:

- Of excess special assessment, see **MUNICIPAL CORPORATIONS**, 8.

REJECTION:

- Of bids for contract, see **MUNICIPAL CORPORATIONS**, 4.

RÉLIEF:

- Decrees and judgments, see **JUDGMENTS**, 1-5, 7-9, 14.

REMAND:

Of cause on appeal or writ of error, see **APPEAL AND ERROR**, 30.
Of cause on appeal, see **CRIMINAL LAW**, 4.

REMOVAL:

Time for removal of timber, see **SPECIFIC PERFORMANCE**, 1.

RENT:

See **LANDLORD AND TENANT**, 3-4.

REPAIRS:

Promise of master to repair defects, see **MASTER AND SERVANT**, 13, 14.

REPEAL:

Of statute providing for letting of contract for county bridge, see **BRIDGES**.
Of statute regulating elective franchise, see **ELECTIONS**, 3.

REPRESENTATIONS:

False representations, see **FRAUD**.
Representation of firm by partner, see **PARTNERSHIP**.

RESCISSION:

Cancellation of written instrument, see **CANCELLATION OF INSTRUMENTS**.
Sale of corporate stock, See **CORPORATIONS**, 8.
Of contract for sale of land, see **VENDOR AND PURCHASER**, 1, 2, 9.

RES GESTAE:

.In civil actions, see **EVIDENCE**, 1, 2.

RESIDENCE:

Of minor sufficient to confer jurisdiction on court, see **GUARDIAN AND WARD**, 1.

RES IPSA LOQUITUR:

See **NEGLIGENCE**, 5.
Presumption of negligence in action for death, see **ELECTRICITY**, 1.

RES JUDICATA:

See **JUDGMENT**, 10-15.
Former decision as law of the case on subsequent appeal, see **APPEAL AND ERROR**, 29.

REVENUE:

See **TAXATION**.

REVIEW:

By higher court on appeal for errors or irregularities, see **APPEAL AND ERROR**.

Statutory writ of review, see **CERTIORARI**.

In criminal prosecution, see **CRIMINAL LAW**, 4-7.

Of orders of railroad commission, see **RAILROADS**, 5-14.

RISKS:

Assumed by employee, see **MASTER AND SERVANT**, 10-14.

RULES:

Of gas company, see **GAS**.

SAFE PLACE TO WORK:

See **MASTER AND SERVANT**, 1-6.

SALES:

Of corporate stock, see **CORPORATIONS**, 7, 8.

Parol evidence to vary contract of sale, see **EVIDENCE**, 6.

Reliance on false representations inducing sale, see **FRAUD**, 8.

To satisfy statute of frauds, see **FRAUDS, STATUTE OF**, 2, 3.

Of intoxicating liquors, see **INTOXICATING LIQUORS**.

Of real property, see **VENDOR AND PURCHASER**.

SEPARATION:

See **HUSBAND AND WIFE**, 4-6.

SERVANTS:

See **MASTER AND SERVANT**.

SERVICE:

Notice of appeal, see **APPEAL AND ERROR**, 11, 12.

Presumption of personal service of process, see **APPEAL AND ERROR**, 20.

Of citation, see **ELECTIONS**.

On owner of duplicate statement of materials furnished, see **Mechanics' Liens**, 1.

Of process, see **PROCESS**.

Orders of railroad commission respecting train service, see **RAILROADS**, 7, 9, 12, 13.

SERVICES:

See **WORK AND LABOR**.

SET-OFF AND COUNTERCLAIM:

Right of surety to offset charge of support of ward in action on guardian's bond, see **GUARDIAN AND WARD**, 2.

Offsetting value of improvements against rent upon denying specific performance, see **SPECIFIC PERFORMANCE**, 3.

SETTLEMENT:

See COMPROMISE AND SETTLEMENT.

SHIPPING:

Right to enter summary judgment against nonappearing sureties on bond releasing vessel in foreclosure action, see ACTION, 4.

Master's liability for injuries to servant from unsafe appliances and places to work, see MASTER AND SERVANT, 3, 12.

SHORES:

Acquiring use of for driving logs, see NAVIGABLE WATERS.

Preference right to purchase shore lands, see PUBLIC LANDS, 3, 4.

SOLVENCY:

Damages through misrepresenting solvency of corporation, see EVIDENCE, 5.

Fraud in representing solvency of corporation, see FRAUD.

SPECIFIC PERFORMANCE:

Compelling issuance of stock by foreign corporation, see CORPORATIONS, 2.

1. **SPECIFIC PERFORMANCE—CERTAINTY—LOGS AND LOGGING—SALE OF TIMBER—TIME FOR REMOVAL.** A land and timber contract is sufficiently certain, as fixing the time for the removal of timber at the end of eight years, to authorize specific performance thereof, where the clause giving the grantee of the timber six years for removal is immediately followed by a provision that the owner of the land is not to clear the lands among the merchantable fir and cedar timber until after six years, and that all timber on said premises at the end of eight years from date shall revert to the owners of the land. *Thill v. Johnson*..... 393
2. **SPECIFIC PERFORMANCE—EVIDENCE—SUFFICIENCY.** In an action for specific performance, findings to the effect that no enforceable contract was made are warranted by the evidence, where the defendant testified that he had offered to sell the land to his son for \$800 cash, and at one time agreed to deliver a deed if the son would give a note for the amount, but the son did not do either, and \$400 received from the son on different occasions was for work done. *Warwick v. Warwick*..... 467
3. **SAME—IMPROVEMENTS—OFFSET—RENTAL VALUE.** Upon denying specific performance of a land contract which was never consummated, the plaintiff is not entitled to recover the value of improvements and taxes paid, where the same amounted only to the rental value of the property occupied by the plaintiff. *Warwick v. Warwick* 467

SPUR TRACKS:

Order of railroad commission requiring extension of, see RAILROADS, 8.

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 14, 15.

STATES:

Supersedeas on appeal from injunction against prosecution of state and Federal canal, see **APPEAL AND ERROR**, 13.

Right of state to review of criminal prosecution, see **CRIMINAL LAW**, 6.

Interest of state in action to enjoin issuance of excessive lien certificates for filling tide lands, see **INJUNCTION**.

Power of legislature to remove bar of statute by retroactive law, see **LIMITATION OF ACTIONS**.

1. **STATES—LEGISLATURE—ELECTION OF MEMBERS—CONTESTS AS TO NOMINATIONS.** Const., art. 2, § 7, providing that each house of the legislature shall be the final judge of the election of its members, does not prevent a judicial contest over the nomination of candidates. *State ex rel. McAvoy v. Gilliam*..... 420

STATIONS:

Location of railroad stations, see **RAILROADS**, 10, 11, 14.

STATUS QUO:

Application of doctrine, see **REFORMATION OF INSTRUMENTS**.

STATUTES:

See **FRAUDS, STATUTE OF**.

Survival of action upon death of party, see **ABATEMENT AND REVIVAL**.

Lien of attorney for compensation, see **ATTORNEY AND CLIENT**.

Receiving deposits after insolvency, see **BANKS AND BANKING**.

Letting contract for county bridge, see **BRIDGES**.

Supersedeas bond on appeal from review of orders of railroad commission, see **CARRIERS**, 3.

Validity of law withdrawing defense of insanity in prosecution for crime, see **CONSTITUTIONAL LAW**, 3-5.

Granting special privileges or immunities, see **CONSTITUTIONAL LAW**, 1.

Responsibility and defenses of criminal insane, see **CRIMINAL LAW**, 1-3, 7.

Action for wrongful death, see **DEATH**.

Regulations of elective franchise, see **ELECTIONS**, 1-4.

Contest of primary nomination, see **ELECTIONS**, 6.

Conviction of lesser offense included in charge, see **INDICTMENT AND INFORMATION**.

Control of liquor traffic, see **INTOXICATING LIQUORS**, 1.

Jurisdiction of justices of peace in criminal causes, see **JUSTICES OF THE PEACE**.

Statutes of limitation, see **LIMITATION OF ACTIONS**.

Recovery of excess in special assessment, see **MUNICIPAL CORPORATIONS**, 8.

STATUTES—CONTINUED.

Construction of statute requiring city to take bond from contractor, see MUNICIPAL CORPORATIONS, 7.

Appeal from order of superior court on review of orders of railroad commission, see RAILROADS, 5, 6.

Treble damages for cutting or carrying away timber, see TRESPASS.

1. STATUTES—PARTIAL INVALIDITY—EFFECT. The unconstitutionality of § 6046, Rem. & Bal. Code, providing imprisonment for failure to pay the hotel inspection fee, does not affect the validity of the balance of the act providing for the inspection of inns and hotels. *State v. McFarland* 98

STAY:

Pending appeal or writ of error, see APPEAL AND ERROR, 13.

Of mortgage foreclosure, see MORTGAGES, 6.

STIPULATIONS:

As appearance, see APPEARANCE.

For maturity of mortgage debt in default, see MORTGAGES, 6.

1. STIPULATIONS — COMPROMISE AND SETTLEMENT — CONSTRUCTION — EMINENT DOMAIN—PUBLIC USE—ESTOPPEL. Where lands wanted for railroad purposes are contracted to be sold to the railroad, in view of condemnation proceedings being instituted, the contract is material in such proceedings, being in effect a stipulation therein, and the owners are estopped therein from asserting that the land was not needed for a public use; and it is immaterial that the contract of sale was conditional upon an adjudication of title in the owners in a case then pending in court, where the owners obtained title by compromising such pending litigation; a voluntary settlement being as binding as a final judgment. *State ex rel. Great Northern R. Co. v. Superior Court* 187

STOCK:

Corporate stock, see CORPORATIONS, 2, 5-8.

STREET RAILROADS:

Injuries to passengers, see CARRIERS, 1, 2.

1. STREET RAILROADS—FRANCHISES—FARES—CONTRACTS — MUNICIPAL CORPORATIONS—ORDINANCES—ANNEXATION OF TERRITORY — EFFECT. A franchise ordinance requiring a street railway to transport passengers from any point within the city limits on any line of the company to the terminus of its line, and to issue transfers for a continuous trip one way to and from all lines for a single fare of five cents, enacted pursuant to a peace contract entered into to settle disputes and correct abuses relating to transfers and fares, is operative over territory subsequently annexed to the city; and, upon annexation, embraces an existing line, formerly outside the city limits, over which the company was operating cars as a part of its

STREET RAILROADS—CONTINUED.

- city system under a county franchise, the county franchise being abrogated by the annexation and contract. *Peterson v. Tacoma R. & Power Co.*..... 406
2. SAME—OBLIGATION OF CONTRACT. Such an ordinance does not impair the obligation of any contract. *Peterson v. Tacoma R. & Power Co.* 406
3. SAME—ORDINANCES—CONTEMPORANEOUS CONSTRUCTION. Such an ordinance not being doubtful, contemporaneous construction by the city, or acquiescence therein, cannot be worked to aid in its interpretation. *Peterson v. Tacoma R. & Power Co.*..... 406
4. STREET RAILROADS—OPERATION OF CARS—FENDERS—MUNICIPAL REGULATIONS—REASONABLENESS—POLICE POWERS. An ordinance requiring a street car company to equip its cars with fenders extending as near its tracks as practicable, so that persons struck *may* be either raised and carried or pushed from the track, is not unreasonable as requiring a guarantee that the fenders *shall* in all cases perform the desired functions; and such ordinance is within the police powers of the city. *Tecker v. Seattle, Renton & Southern R. Co.*..... 570
5. STREET RAILROADS—OPERATION OF CARS—FENDERS—COMPLIANCE WITH REGULATIONS—QUESTION FOR JURY. It is a question for the jury to determine whether a street car fender, twenty-two inches above the track, was carried as near the rails as was consistent with practical operation of the cars, where there was testimony that it was practical to carry them eight inches above the track. *Tecker v. Seattle, Renton & Southern R. Co.*..... 570
6. STREET RAILROADS—INJURY TO PERSONS ON TRACK—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The jury is warranted in finding gross negligence on the part of a motorman in running down a child six years old, where a moment before the motorman had been talking with a passenger and not looking at the track, and when he first observed the child it was fifteen feet ahead of the car, crossing the street in a place of safety "if it had stopped," but it kept going and paid no attention to the gong, the car was going up grade, the day was clear and the view unobstructed. *Tecker v. Seattle, Renton & Southern R. Co.* 570
7. STREET RAILROADS—COLLISION WITH VEHICLE—NEGLIGENCE—EXCESSIVE SPEED. In an action for injuries sustained in a collision of a street car with a vehicle, a nonsuit is properly denied, where there was evidence that the car was running thirty-five or forty miles an hour on a public street. *Denny v. Seattle, Renton & Southern R. Co.*..... 426
8. STREET RAILROADS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for injuries sustained in a collision of a street car and plaintiff's wagon, the plaintiff is not guilty of contributory negligence, as a matter of law, where, before crossing the track, he looked back and saw a car

STREET RAILROADS—CONTINUED.

approaching about two blocks away, and assumed that he had time to cross, but before he could do so the rear wheel was struck by the car running at the rate of thirty-five or forty miles per hour. *Denny v. Seattle, Renton & Southern R. Co.*..... 426

9. **SAME—CONTRIBUTORY NEGLIGENCE—CHILDREN.** A child six years of age is not, as a matter of law, guilty of contributory negligence in running across a street in front of an approaching street car, its conduct indicating that it had not seen the car. *Tecker v. Seattle, Renton & Southern R. Co.*..... 570
10. **SAME—ACTION FOR DEATH—CONTRIBUTORY NEGLIGENCE OF PARENT.** A parent is not guilty of contributory negligence, as a matter of law, precluding recovery for the death of a child six years of age, struck by a street car, in sending the child in care of another, ten years old, to the post office, two blocks away. *Tecker v. Seattle, Renton & Southern R. Co.*..... 570
11. **SAME—NEGLIGENCE—CROSSINGS—INSTRUCTIONS.** It is not error to instruct that negligence is a relative question, and that a street car company is required to exercise greater care at crossings than at other places, where fewer people are likely to be encountered. *Tecker v. Seattle, Renton & Southern R. Co.*..... 570
12. **SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTIONS.** In an action for the death of a child struck by a street car, it is not error to instruct that the burden of proving contributory negligence is upon the defendant, and properly defining what would constitute contributory negligence. *Tecker v. Seattle, Renton & Southern R. Co.*..... 570

STREETS:

See **MUNICIPAL CORPORATIONS.**

Forfeiture of railroad franchise in city street, see **RAILROADS, 1.**

STRUCTURES:

Insufficient structure as nuisance, see **NEGLIGENCE, 3; NUISANCE, 3.**

SUBSCRIPTION:

To corporate stock, see **CORPORATIONS, 7, 8.**

SUBSTITUTION:

Of widow and minor children in action for personal injuries, see **ABATEMENT AND REVIVAL.**

SUMMONS:

See **PROCESS.**

Commencement of action, see **ACTION, 2, 3.**

SUPERSEDEAS:

On appeal or writ of error, see **APPEAL AND ERROR**, 13.

Bond on appeal from review of orders of railroad commission, see **CARRIERS**, 3.

SURVEYS:

Location of lost boundary, see **BOUNDARIES**.

SURVIVAL:

Of cause of action, see **ABATEMENT AND REVIVAL**.

SUSPENSION:

Of member of benefit insurance society, see **INSURANCE**, 9-11.

TACKING:

Successive possession, see **ADVERSE POSSESSION**.

TAXATION:

Liquor licenses, see **INTOXICATING LIQUORS**, 1.

Vacation of tax judgment as *res judicata*, see **JUDGMENT**, 14.

Evidence of service of process in action to vacate default in tax foreclosure, see **PROCESS**, 2.

1. **TAXATION—ASSESSMENT—LOWER RATE ON OTHER PROPERTY.** The assessment of the property of others at a lower rate than that of a complaining taxpayer, whose property is not assessed beyond its cash value, does not invalidate the tax. *Doty Lumber & Shingle Co. v. Lewis County*..... 428
2. **TAXATION — ASSESSMENT — OMISSION OF PROPERTY — MISTAKE OF LAW.** The failure of the assessor to assess money, on the erroneous advice of the attorney general who was mistaken as to the law, does not affect the validity of a tax upon other property. *Doty Lumber & Shingle Co. v. Lewis County*..... 428
3. **TAXATION—ASSESSMENT—EQUALIZATION — OMISSION OF PROPERTY.** The failure of the board of equalization to raise the assessment on timber uncruised, or where no notice could be given to the owners, does not prevent a raise on cruised timber on notice to the owners and a hearing. *Doty Lumber & Shingle Co. v. Lewis County*... 428
4. **TAXATION—ASSESSMENT — REVIEW.** The action of the board of equalization in raising an assessment on timber that has been cruised, on notice to owners given, cannot be reversed or set aside where the board did not act fraudulently or arbitrarily, but in good faith considered the distance of the property from railroads or logging streams, the contour of the land, and quality of the timber. *Doty Lumber & Shingle Co. v. Lewis County*..... 428
5. **TAXATION—TAX TITLES—MORTGAGEE—PURCHASE TO PREVENT REDEMPTION OF MORTGAGE.** A mortgagee cannot acquire a tax title against the mortgaged property and hold the same against the

TAXATION—CONTINUED.

mortgagor, except as a lien for the taxes paid, and one acquiring the tax title under a conspiracy with the mortgagee can acquire no greater right than could the mortgagee. *Maier v. Potter*..... 443

6. TAXATION—TITLE—ACTION TO SET ASIDE—LIMITATIONS—TRUSTS—PURCHASE IN INTEREST OF MORTGAGEE. The three years statute of limitations for actions to set aside a tax deed does not apply as to one acquiring the tax title pursuant to a conspiracy with a mortgagee of the premises, for the purpose of preventing a redemption from the mortgage; since such conspirator would hold the lands in trust for the mortgagor, and as security for the money paid for taxes. *Maier v. Potter*..... 443
7. TAXATION—PLEADING AND PROOF—AMENDMENTS. Where, in an action to set aside a tax title, the defendant in two amended answers pleaded title and possession in himself, it is not an abuse of discretion, upon sustaining an objection to his deposition showing that he was a married man, to refuse leave to amend the answer to show that the title was in himself and wife as community property. *Worthington v. La Violette*..... 525
8. TAXATION—PERSONAL PROPERTY—LIEN ON PROPERTY—TITLE—DISTRAINT. Under Rem. & Bal. Code, § 9235, providing that taxes assessed upon personal property shall be a lien thereon, regardless of transfers made, a vendee under a conditional sale, whereby the title to personal property remained in the vendor, cannot maintain an action to restrain the distraint of the property for personal property taxes, since it is immaterial who holds the title thereto, or to whom it was assessed. *Lewis Construction Co. v. King County*. 694

TENANCY IN COMMON:

1. TENANTS IN COMMON—PURCHASE AT FORECLOSURE SALE—REDEMPTIONS. There is a constructive redemption, which inures to the benefit of cotenants, where a widower, occupying community property as tenant in common with his children, allowed a mortgage to be foreclosed and contracted to purchase the same from the purchaser at the foreclosure sale. *Eckert v. Schmitt*..... 23
2. TENANCY IN COMMON—ACCOUNTING—PARTITION. Where a divorced second wife has come into the possession of community real property of the first marriage belonging one-half to the children of the first wife, they are entitled to an accounting and partition. *Eckert v. Schmitt*..... 23

TENDER:

Of price of land, see VENDOR AND PURCHASER, 8.

TESTAMENT:

Testamentary disposition of property by deed, see WILLS.

THEATERS AND SHOWS:

Injury to spectators from dangerous or defective premises, see **LANDLORD AND TENANT**, 5.

TIDE LANDS:

State as party to action enjoining issuance of excessive lien certificates for filling tide lands, see **INJUNCTION**.

Disposal of state tide or shore lands, see **PUBLIC LANDS**, 3, 4.

Right of purchasers of to assert invalidity of law establishing state aid road in action to reform deed to except road included by mistake, see **REFORMATION OF INSTRUMENTS**.

TIMBER:

Cutting, see **LOGS AND LOGGING**.

TIME:

Of commencement of action, see **ACTION**, 2, 3.

For service of citation in election contest, see **ELECTIONS**, 5.

For application to vacate judgment, see **JUDGMENT**, 5.

For filing statement or claim for mechanics' lien, see **MECHANICS' LIENS**, 2.

For removal of timber, see **SPECIFIC PERFORMANCE**, 1.

TITLE:

Estoppel to assert title, see **ESTOPPEL**, 1.

To maintain suit to quiet title, see **QUIETING TITLE**.

Tax titles, see **TAXATION**, 5.

Sufficiency of title of vendor of land, see **VENDOR AND PURCHASER**, 5-7.

Defect as ground for rescission of sale of land, see **VENDOR AND PURCHASER**, 2, 3.

TOOLS:

Right to claim lien for tools furnished, see **LOGS AND LOGGING**, 3.

TORTS:

See **ASSAULT AND BATTERY**; **FRAUD**; **NEGLIGENCE**; **NUISANCE**; **TRESPASS**.

Survival of action for, see **ABATEMENT AND REVIVAL**.

In carriage of passengers, see **CARRIERS**, 1, 2.

By corporate officers, see **CORPORATIONS**, 4.

By counties, see **COUNTIES**.

Damages, inadequate or excessive, see **DAMAGES**, 1-4.

Damages for causing death, see **DEATH**.

Negligence in driving team, see **HIGHWAYS**.

Injuries from defective or dangerous condition of demised premises, see **LANDLORD AND TENANT**, 5.

Injuries by employer, see **MASTER AND SERVANT**.

Of cities, see **MUNICIPAL CORPORATIONS**, 9.

TORTS—CONTINUED.

Negligent operation of railroads, see **RAILROADS**, 2-4.

Injuries caused by operation of street cars, see **STREET RAILROADS**, 4-12.

Breach of trust in paying funds to rival organization, see **TRADE UNIONS**.

TOWNS:

Recovery of unearned portion of county license upon incorporation of town, see **INTOXICATING LIQUORS**, 2, 3.

Jurisdiction and venue in prosecution for violation of town ordinance, see **JUSTICES OF THE PEACE**.

TRADE UNIONS:

1. **TRADE UNIONS—IDENTITY—CHANGE IN AFFILIATIONS—FUNDS—PROPERTY RIGHTS.** The identity of an unincorporated labor association and its property rights are not affected by changes in its affiliations with other labor unions or organizations; and it is a gross breach of trust for its officers to pay over its funds to a rival organization with which it affiliated at one time. *Shipwrights, Joiners & Calkers Association v. McFarland*..... 529

TREBLE DAMAGES:

For trespass, see **TRESPASS**.

TRESPASS:

Liability of corporate officers for, see **CORPORATIONS**, 4.

1. **TRESPASS—TREBLE DAMAGES—WHEN ALLOWED—STATUTES.** Upon trespass for cutting and carrying away timber, and for altering the course of a river, Rem. & Bal. Code, § 939, allows treble damages only for the cutting and removal of the timber. *Lytle Logging & Mercantile Co. v. Humptulips Driving Co.* 559
2. **SAME—CUTTING TIMBER—LAWFUL AUTHORITY—APPEAL—REVIEW VERDICT—EVIDENCE—SUFFICIENCY.** Under Rem. & Bal. Code, §§ 939, 940, giving treble damages for cutting or carrying off trees or timber without lawful authority, unless the trespass was casual or involuntary, a verdict for single damages, upon an unsupported finding that the trespass was casual or involuntary, will not be disturbed on appeal, where the evidence showed that the cutting was authorized by the plaintiff's superintendent who requested an accurate account of all timber cut; since it warranted a finding that it was not cut without lawful authority. *Lytle Logging & Mercantile Co. v. Humptulips Driving Co.* 559

TRIAL:

Review of ruling as dependent on presentation of objection or exception in lower court, see **APPEAL AND ERROR**, 6-8, 10.

Necessity for including findings in transcript, see **APPEAL AND ERROR**, 15.

TRIAL—CONTINUED.

Review of rulings as dependent on presentation of same by record, see **APPEAL AND ERROR**, 14, 15.

Review of rulings as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 25-28.

Conclusiveness of findings on conflicting evidence, see **APPEAL AND ERROR**, 23, 24.

Review of findings in trial by court, see **APPEAL AND ERROR**, 23, 24.

Presumptions on appeal or writ of error, see **APPEAL AND ERROR**, 20.

In criminal prosecutions, see **CRIMINAL LAW**.

Instruction as to maximum damages, see **DAMAGES**, 5.

Instructions in action for wrongful death, see **ELECTRICITY**, 2.

To jury of issues in equity, see **EQUITY**.

Instructions in action for fraud, see **FRAUD**, 2, 3.

Right to trial by jury, see **JURY**.

Instructions in prosecution for larceny, see **LARCENY**.

Instructions as to evidence to overcome presumption of negligence, see **NEGLIGENCE**, 5.

Motions and grounds for new trial, see **NEW TRIAL**.

Instructions in action for death of minor struck by street car, see **STREET RAILROADS**, 11, 12.

Attendance and examination of witnesses, see **WITNESSES**.

1. **TRIAL—ORDER OF PROOF—REBUTTAL.** In an action for injuries caused by a runaway team, evidence in rebuttal to show that the team was not beyond control when it reached a certain point may be excluded, where the plaintiff's witnesses were examined fully on this subject on their examination in chief. *Kimble v. Stackpole* 35
2. **TRIAL—MOTIONS—ARGUMENT OF COUNSEL—DISCRETION.** It is discretionary for the trial court to refuse counsel the privilege of arguing on his motion for a nonsuit. *Hull v. Seattle, Renton & Southern R. Co.* 162
3. **TRIAL—PROVINCE OF COURT—NONSUIT—CONTRIBUTORY NEGLIGENCE.** An action for personal injuries cannot be taken from the jury on the ground of plaintiff's contributory negligence, unless the same appears so plainly that reasonable minds cannot differ as to the natural consequences of the acts proven. *Anderson v. Pacific National Lumber Co.* 415
4. **TRIAL—INSTRUCTIONS—COMMENT ON FACTS—EMINENT DOMAIN.** In a condemnation proceeding, instructions are not an unlawful comment on the evidence by reason of clauses as to the "special benefits that will accrue to the property" "if you think the conditions that exist.....are unsettled," where they had reference to instructions already given in that connection, and did not assume that there would be any such benefits, but plainly left it to the jury to determine. *In re Westlake Avenue* 549

TRIAL—CONTINUED.

5. TRIAL—SPECIAL VERDICT—DISCRETION. It is discretionary with the trial court to require a special verdict. *Butler v. Supreme Court of The Independent Order of Forresters* 171
6. TRIAL—FINDINGS—NECESSITY. Specific findings are not necessary in an equity case. *Leitch v. Young* 446
7. TRIAL—FINDINGS—CONSTRUCTION—NUISANCES. A finding that a railing around a balcony in a public building was a nuisance at the time of the accident, at which time a great crowd was pressing upon it, has the effect of finding that it was a nuisance at the time it was completed, it being in the same condition at both times. *Thornton v. Dow* 622

TROVER AND CONVERSION:

Misappropriation of corporate funds by officer, see CORPORATIONS, 6.

TRUSTS:

Mortgage in trust for creditors, see MORTGAGES, 4, 5.

Holder of tax title by conspiracy with mortgagee as trustee for mortgagor, see TAXATION, 6.

1. TRUSTS—DECLARATION OF TRUST. Where the purchaser of corporate stock acknowledged in a letter that part of the stock was to be reassigned to the owners, the letter did not amount to a declaration that the purchaser held the stock in trust for the person to whom the letter was written, where such person only had a half interest therein and desired to defraud his co-owner out of the other half interest. *Miner v. Paulson* 150
2. TRUSTS—CONSTRUCTIVE TRUST—ESTABLISHMENT—PAROL EVIDENCE—SUFFICIENCY. To establish a constructive trust by parol, in lands bid in at execution sale, the evidence must be clear, cogent, and convincing, and such a trust is sufficiently established where it appears that the purchaser at the request of a brother, to whom he was indebted, bid in the property, in which his brother had a present interest, at an execution sale for one-half of its value, the brother being unable to attend the sale and refraining from securing the bidders, and his testimony being clearly supported by documents and undisputed circumstances and evidence of disinterested witnesses. *Harras v. Harras* 258
3. TRUSTS—PARTITION—RIGHTS UNDER CONTRACTS—DISCRETION OF TRUSTEES—CONTROL BY COURTS—DEDICATIONS—PLATS—VACATION. In the absence of fraud or manifest error from which fraud would be inferred, the courts will not control the discretion of trustees, under a trust agreement whereby lots and fractional lots in an addition not conforming to adjacent streets were conveyed to the trustees to secure vacation of the plat and to replat and thereafter distribute the new lots among the grantors as their general interest may appear, considering and preserving the rights, both legal and equitable

TRUSTS—CONTINUED.

of all, with power to assess owelty or benefits if deemed necessary to an equitable partition; and it is not necessary that the trustees consider the vacated portion of streets as additions to abutting property, where they estimated the relative value of the old lots and fractions and partitioned to the owners a proportionate part of the estimated value of the new lots as replatted. *Laffoon v. Balkwill* 401

UNIONS:

See TRADE UNIONS.

VACATION:

Of divorce decree, see DIVORCE.

Of judgment, see JUDGMENT, 1-5, 7-9, 14.

Denial of motion to vacate order sustaining demurrer as *res judicata*, see JUDGMENT, 12.

Tax sale, see TAXATION, 6, 7.

Trust agreement to secure vacation, replat and distribution to owners, see TRUSTS, 3.

VALUE:

Liability for reasonable value of bridge constructed under illegal contract, see COUNTIES, 2.

VARIANCE:

In action for injuries to passenger, see CARRIERS, 2.

VENDOR AND PURCHASER:

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2, 3.

Effect of *lis pendens* on subsequent purchasers, see LIS PENDENS.

Preference right to purchase shore lands, see PUBLIC LANDS, 3, 4.

Estoppel of grantees in action to reform state deed of tide lands, see REFORMATION OF INSTRUMENTS.

Specific performance of contract, see SPECIFIC PERFORMANCE.

Right of vendee under conditional sale to enjoin distraint of property for personal property tax, see TAXATION, 8.

Right of mortgagee to acquire tax title, see TAXATION, 5, 6.

Purchase by cotenant from purchaser at foreclosure sale, see TENANCY IN COMMON, 1.

Purchaser as trustee, see TRUSTS, 1, 2.

1. VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD OF AGENT—EVIDENCE OF RELATION—SUFFICIENCY. In an action by vendees to recover earnest money, paid upon representations of the alleged agent of the vendor, the evidence sufficiently shows that such agent was the agent of the vendees where the agent testified that he was representing the vendees, who did not deny the same, and the agent in a letter objected to defects shown by the abstract. *Singer v. Guy Investment Co.* 674

VENDOR AND PURCHASER—CONTINUED.

2. **SAME—DEFECTS IN TITLE—ABSTRACT.** In an action to rescind a sale for defects in the title, an objection that the abstract does not show whether a certain grantee in the chain was married or single is unavailing where such grantee made affidavit that she was a widow when she received the title. *Singer v. Guy Investment Co.* 674
3. **SAME.** Upon objection to an abstract upon one specified ground, other grounds are waived *Singer v. Guy Investment Co.* 674
4. **VENDOR AND PURCHASER—PERFORMANCE—BREACH BY VENDEE—WAIVER—CONSIDERATION FOR PROMISE.** Where the purchaser of land agreed to sow one-half of the same in wheat, and deposit one-half of the proceeds to be applied in deferred payments and interest, the acceptance by the vendor of such part of the proceeds does not waive defaults of the purchaser in failing to cultivate half of the land or pay the taxes; and surrender of such money belonging to the vendor would constitute no consideration for a promise to waive the defaults. *Catterson v. Ireland* 208
5. **VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE—BURDEN OF PROOF.** A purchaser of lots with actual notice of a lien thereon has the burden of proving that one of his predecessors in interest was a *bona fide* purchaser without notice, if he would free the lots of the lien. *Biggs v. Hoffman* 495
6. **VENDOR AND PURCHASER—BONA FIDE PURCHASER—RECORDS—CHAIN OF TITLE.** A purchaser without notice may rely on the record chain of title. *Burr v. Dyer* 603
7. **SAME—RECITALS.** Where one partner in a real estate firm had undertaken to convey the whole title to partnership property to grantees paying for the same, a quitclaim and release between the partners, whereby the other partner agreed to deliver deeds to all third parties entitled thereto, duly recorded, is part of the record chain of title of the lots in question, so as to be notice to subsequent purchasers of the equities of the first grantees, where it recited that the lands referred to were more particularly described in quitclaim deeds of a specified date, and comprise all lands known to be covered by conditional sale contracts in which the partners appear as parties of the first part for which proper deeds had not been given. *Burr v. Dyer* 603
8. **VENDOR AND PURCHASER—CONTRACT—BREACH BY VENDOR—DAMAGES—TENDER OF PAYMENT.** In an action at law for damages for breach of a contract to convey premises, a legal tender of the amount due on the purchase price is necessary; and it is not sufficient that the purchaser merely asked the vendor if he would accept payment in full and he stated that he would not, where there was no production of the money or offer to produce it. *Catterson v. Ireland* 208

VENDOR AND PURCHASER—CONTINUED.

9. **VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD—EVIDENCE—ADMISSIBILITY.** In an action to recover earnest money, paid on false representations by and through certain maps that lots were contiguous, it is not error to sustain an objection to a question as to where plaintiffs' agent got the maps, where no offer was made to show that the maps did not come from the defendant or its agents and it appears that they did not. *Singer v. Guy Investment Co.* 674

VENUE:

In justice's court, see **JUSTICES OF THE PEACE.**

VERDICT:

Review on appeal or writ of error, see **APPEAL AND ERROR**, 21, 22.
 Inadequate or excessive damages, see **DAMAGES**, 1-4; **DEATH**, 3.
 Of jury in equity case, see **EQUITY.**
 Judgment directing verdict as bar to another action, see **JUDGMENT**, 13.
 Irregularities or defects ground for new trial, see **NEW TRIAL.**
 Damages for trespass to standing timber, see **TRESPASS.**
 In civil actions, see **TRIAL**, 5.

VICE PRINCIPALS:

Acts of as constituting negligence, see **MASTER AND SERVANT**, 6.

VOTERS:

See **ELECTIONS.**

WAIVER:

See **ESTOPPEL.**
 Of error on appeal, see **APPEAL AND ERROR**, 8, 10, 18.
 Of right to appeal, see **APPEAL AND ERROR**, 3-5.
 Of false representations by subscriber to corporate stock, see **CORPORATIONS**, 8.
 Of rules by gas company, see **GAS**, 2.
 Of right to offset support of ward against liability on guardian's bond, see **GUARDIAN AND WARD**, 2.
 Of forfeiture by acceptance of dues, see **INSURANCE**, 10.
 Proofs of loss, see **INSURANCE**, 5, 6.
 Of mechanics' lien, see **MECHANICS' LIENS**, 3, 4.
 Of right to redeem, see **MORTGAGES**, 3.
 By vendor of defaults of vendee, see **VENDOR AND PURCHASER**, 4.
 Objections to abstract, see **VENDOR AND PURCHASER**, 3.

WARDS:

See **GUARDIAN AND WARD.**

WATERS AND WATER COURSES:

Floating logs on streams, see **LOGS AND LOGGING**, 2.

Waters capable of navigation as public highways, see **NAVIGABLE WATERS**.

WEAPONS:

Assault with deadly weapons, see **ASSAULT AND BATTERY**.

WILLS:**1. WILLS — TESTAMENTARY DISPOSITION — DEEDS — CONSTRUCTION.**

Where old people called their children together and the parties agreed upon a division of the real property, deeded to the children with a life estate reserved, the deeds being delivered to the county auditor to be recorded after the grantors' deaths, and, at the same time, the grantees in one of the deeds made a deed of a certain tract to three grandchildren of the old people, at their request, containing a proviso "that this deed shall be void and of no effect until our death," the transaction amounts to a testamentary disposition by the old people, and not by the grantors in the last deed. *Simmons v. Macomber* 469

2. WILLS—TESTAMENTARY DISPOSITION—DEEDS—RECALL.

A change in the custody of such deeds, from the county auditor to a son of the grantors, does not amount to a recall of the deeds. *Simmons v. Macomber* 469

WITNESSES:

See **DEPOSITIONS**.

Demand to produce writing and effect of failure to comply, see **EVIDENCE**, 9.

1. WITNESSES—COMPETENCY—HUSBAND AND WIFE—INCEST.

The wife is not a competent witness against the husband in a prosecution for incest, under Rem. & Bal. Code, § 1214, providing that a wife shall not be competent to testify against the husband without his consent, except in a prosecution for a crime committed against her. *State v. Beltner* 397

WOODS AND FORESTS:

Oral agreement for sale of timber, see **FRAUDS, STATUTE OF**, 2, 3.

Cutting and floating of logs, see **LOGS AND LOGGING**.

Specific performance of land and timber contract, see **SPECIFIC PERFORMANCE**, 1.

Assessing timber for taxation, see **TAXATION**, 1-4.

Cutting or carrying away timber, see **TRESPASS**.

WORK AND LABOR:

Liens for work and materials, see **MECHANICS' LIENS**.

Labor unions, see **TRADE UNIONS**.

WORK AND LABOR—CONTINUED.

1. **WORK AND LABOR—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to warrant the verdict of a jury in favor of plaintiff for work and labor, where the amounts due and sums paid are admitted or established by uncontroverted evidence, and the process of addition and subtraction determines that the defendant had overpaid the plaintiff and was entitled to a counterclaim. *Price v. Ollam Coal Co.* 671

WRITINGS:

Demand to produce and effect of failure, see **EVIDENCE**, 9.
Parol evidence to vary or explain, see **EVIDENCE**, 6-8.

WRITS:

See **CERTIORARI**; **INJUNCTION**; **MANDAMUS**; **PROCESS**.

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